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ARGUMENT—Continued.

CASES CITED

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 133

THE BALTIMORE & OHIO RAILROAD COMPANY ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS

The opinion of the specially-constituted District Court (R. 302, 311), *Baltimore & O. R. Co.* v. *United States*, is reported in 20 F. Supp. 273 and 917.

The reports of the Interstate Commerce Commission (R. 29–115; 120–199; 269–271, entitled Ex Parte No. 104, *Practices of Carriers Affecting Operating Revenues or Expenses, Part VI, Warehousing and Storage of Property by Carriers at*

Port of New York, N. Y., are reported in 198 I. C. C. 134, 216 I. C. C. 291, and 220 I. C. C. 102.

QUESTIONS PRESENTED

In a proceeding instituted upon its own motion, following complaints by numerous commercial warehousemen in the Port of New York district, and after full hearing, the Commission found that the appellants, seven trunk-line railroads serving New York, are there engaged extensively in voluntary, commercial warehousing and storage, beyond their duties as common carriers to perform, and, in their competition one with another for line-haul transportation, offer and give to certain interstate shippers commercial warehousing services or warehouse space at charges or rentals below the cost of performing such services or providing such space, in order to induce the movement of traffic over their respective lines, drawing upon their revenues derived from the line-haul transportation to recoup the losses from the warehousing at below-cost charges, with the result that the traffic of these shippers is transported at rates less than those specified in the published tariffs, in violation of section 6 (7) of the Interstate Commerce Act, while other shippers are charged the full line-haul tariff rates undiminished by below-cost warehousing and are thus subjected to unjust discrimination and undue prejudice, in violation of sections 2 and 3 of the Act,

and the carriers' revenues and funds are dissipated in substantial amounts, contrary to efficient and economical management and contrary to the public interest. To correct these violations of the Act, the Commission requires, by order dated February 2, 1937 (R. 272–274), that the carriers shall cease and desist from performing such commercial warehouse services or providing space for commercial warehousing, for interstate shippers over their lines, at rates and charges which fail to compensate them for the cost of performing the services or providing the space.

The question presented is the validity of this order. Subordinate questions are:

(1) Whether the Commission's findings are adequate to support the order.

(2) Whether certain of the warehousing services performed by appellants, viz., storage, handling and insurance of goods stored in the New York district after a short movement within the district and subject to reshipment within periods ranging up to three years, at the through rate, are in fact commercial services, as found by the Commission, or whether they are "transportation" services which the carriers may, on that ground, lawfully perform at below-cost charges.

STATUTES

The pertinent statutory provisions are printed in the Appendix, *infra*, pages 122–127.

STATEMENT

This is an appeal from a final decree of the court below (R. 406) dismissing, for want of equity, a joint petition filed by the seven appellants [1] (R. 1) to enjoin and set aside the Commission's order (R. 272) of February 2, 1937, in Ex Parte No. 104, *Practices of Carriers Affecting Operating Revenues or Expenses, Part VI, Warehousing and Storage of Property at Port of New York, N. Y.*

Appellants are trunk-line railroads which serve the metropolitan district of New York City and have lines running westwardly through trunk-line territory and beyond. They are keen competitors for the New York traffic, both eastbound and westbound. Competition for the westbound traffic is especially sharp, since the New York District is a point of origin on each of their lines and a tremendous volume of westbound traffic, both import and domestic, originates there. The New York Central, the Pennsylvania, the B. & O., and the Erie each has its own line from New York to Chicago. The Lehigh Valley and the Lackawanna extend from New York to Buffalo, and the Jersey Central from New York to Scranton. Either direct with their own lines or by through routes and joi rates with connecting railroads, these seven carriers compete for the transportation of this, an important

[1] The common designations of these carriers, viz., B. & O., Jersey Central, Lackawanna, Erie, Lehigh Valley, New York Central, Pennsylvania, are generally used herein.

part of the country's commerce. As shown herein, the Commission found that their competition for this traffic motivated their entrance into the commercial warehousing business, accounted for the rate cutting in warehousing services, space rentals, etc., to below-cost levels with consequent large revenue losses, and the discriminations and other violations of the Interstate Commerce Act found by the Commission, the abatement of which is the purpose of the order here challenged.

Certain other railroads serving New York, notably the New York, New Haven & Hartford and the Long Island Railroad, were also respondents in the Commission proceeding, but it was not found that they engage in the warehousing practices condemned in the Commission's reports and the order is not directed to them.

Sixty-five warehouse companies, not affiliated with either the appellants or any other railroads, are engaged in the commercial warehouse business in the Port of New York district. Their warehouses are located in Manhattan, Brooklyn, Jersey City, Hoboken, Newark, and other sections of the port district. Forty-three operate merchandise warehouses, 22 operate cold storage warehouses. Their principal business is the storage for long or short terms, assembling, handling, and distribution of freight, and incidental services in connection therewith. (R. 125–126, 346)

The goods warehoused and stored by them are shipped in interstate commerce to and from all sections of the United States over appellants' lines, and their business is dependent for existence upon the appellants' transportation services coupled with reasonable and nondiscriminatory rates and practices. (R. 96, 97, 346)

These warehousemen, through a protective committee, brought to the Commission's attention the warehousing practices of the railroads serving the New York district, averring that warehouses owned or controlled by the railroads, or in which they have financial interests, were being operated in a manner which precluded the complaining warehousemen from obtaining much of the business, that the complaining warehouses were losing much of their business to railroad or railroad-affiliated warehouses, that they could no longer meet the competition of such warehouses. (R. 31) They alleged that the railroads' warehousing practices violated sections 2, 3, and 6 of the Interstate Commerce Act, and dissipated the carriers' revenues. (R. 344)

The Commission instituted an investigation and after extensive hearings and usual procedure issued its report, (198 I. C. C. 134). It found that these railroads, departing from their duties as common carriers, have entered the field of commercial warehousing of both the merchandise and cold storage type, and are engaged extensively in that

business, in competition with the complaining warehousemen, in the New York district. (R. 35–36, 103, 104, 105, 122, 124–188 *et seq.*, 271.)

Prior to 1926, the B. & O. and the Jersey Central had engaged in the business in a relatively small way, the B. & O. having constructed a warehouse in Manhattan in 1914 and the Jersey Central one in Newark in 1906, located upon and served exclusively by their rails, and had operated them as commercial warehouses through controlled subsidiary companies. (R. 42–47; 52–54, 352)

During the period from 1927 to 1934, there was great expansion in the business by appellants, with intensive competitive building of large new warehouses by them. The first of these, completed November 1, 1927, was the 10-story warehouse of the Seaboard Terminal & Refrigeration Company, sponsored by the Erie and located upon its rails in Jersey City. This was followed by the Lehigh Valley's 12-story Bronx Terminal warehouse, constructed in 1929 and its Starrett-Lehigh building, on 27th Street from 11th to 13th Avenues, completed in 1930. The Lackawanna Terminal Warehouse, an 8-story building, constructed by the Lackawanna on its tracks at Jersey City, was completed in April 1930. At about the same time the Pennsylvania completed its Harborside warehouse in Jersey City. The New York Central, in 1930, constructed its Kingsbridge warehouse, in the Bronx, a 6-story building, and in 1934 its St. John's

Park Terminal building in lower Manhattan. (See Court Findings 34–41, 350–352.)

The total railroad outlay in connection with these warehouses for commercial operations was approximately $25,000,000. (R. 112, 114) The result is that each of these seven carriers has one or more warehouses on its rails in the New York district and either directly or through a subsidiary company engages in the commercial warehouse business.

This business, which is distinguished from the storage involuntarily performed by carriers generally as an incident of transportation, is of the same general type as that engaged in throughout the country by commercial warehousemen under and pursuant to their private contracts, arrangements and dealings with patrons of warehouses. (R. 35, 124)

Most of the warehouses above mentioned are operated by appellants through subsidiary corporations which are dominated and controlled by appellants.[2] Where this is the case the storage and warehousing operations generally are conducted in the name of the subsidiary company.

In addition to those warehousing activities, each of the seven appellants is engaged, directly and in its own name, in the capacity of commercial warehouseman, in competition with the complaining

[2] See R. 42, 56, 59, 68–70, 70–71, 77, 82, 87–91, 106–107, 128, 135, 136–137, 144, 149, 150, 153, 155–156, 159–160, 170, 175.

commercial warehousemen in the Port of New York district, in the warehousing and storage of goods stored under the storage-in-transit privilege. (R. 352)

Under this privilege, goods arriving in New York Harbor by vessel are unloaded at shipside and moved by the rail carrier to the warehouse, under a bill of lading showing the warehouse as the destination. At the time of this movement to the warehouse, freight charges are collected at the local rate specified in the tariffs. If the goods are forwarded from the warehouse to a western destination over the line of the same carrier and within a specified time (varying as to different commodities, e. g., crude rubber 2½ years, unmanufactured tobacco 3 years, other commodities 1 or 2 years), freight charges are collected on basis of the through rate from shipside to final destination, which through rate in all instances is the same as the rate from the warehouse, and a refund is made of the local inbound freight charges. (R. 38, 105, 181, 353–356)

Substantially uniform rules and regulations relating to this privilege are published in separate tariffs of the appellants which are filed with the Commission. These tariff provisions govern the application of appellants' transportation rates; they have no relation to the rates and charges for the warehousing or storage service itself. (R. 353–354) Appellants' rates covering these warehousing services are also published in their tariffs, that

is, rates covering the storage and the labor or "handling" charges into and out of the warehouse, also their charges for insuring the goods stored. These rates and charges are fully shown in the Commission's reports. (R. 38–39; 102, 179–180, 181–182, 192–196) The storage, handling and insurance charges of each of the appellants are with one or two minor exceptions identical.

For this storage appellants utilize space in their pier buildings and in several instances in the warehouses of their subsidiary warehouse companies; in one instance space is rented by the carrier (B. & O.) in warehouses of independent companies (American Dock Stores and Pouch Terminal Stores, on Staten Island, served by B. & O. rails). (R. 354–356)

Storage under this transit privilege is usually long-term storage, as long as three years, is of entirely the voluntary type of solicited storage business as distinguished from involuntary storage which every carrier necessarily performs as an incident of transportation (as, for example, where the consignee fails to take prompt delivery of his goods) and, the Commission found, is commercial storage, not within common-carrier duties. (R. 35–36, 47–49, 103, 128, 181, 188–191, 196, 197, 271, 352–358)

Substantial volumes of goods are warehoused and stored by the appellants under this storage-in-transit privilege, the tonnages stored during 1933 for example being 152,746 tons of rubber, 33,570

tons of wood pulp, and 65,914 tons of various other commodities such as coffee, sugar, flour, soap, etc., or a total of 252,230 tons (504,460,000 pounds), equivalent to 12,612 carloads of 20 tons each. (R. 186–187, 354).

The Commission found that appellants' charges for this storage, and for handling and insurance in connection therewith, are far below their costs (one-half or even a smaller fraction), and that their losses from this storage, handling and insurance are heavy. (R. 354, 185–188, 112, 115)

"At New York," the Commission found "respondents now generally store freight on piers owned or leased by them and in warehouses operated by affiliated or subsidiary companies. The forms of title to the warehouses are various. In a number of instances the respondents lease all or parts of buildings for warehouse operations; in others they own the ground, aided in financing the structures located thereon, and lease from their own subsidiaries space in such buildings; and in still others they own the land and structures, but lease them in entirety or in large part to subsidiary corporations for warehouse operations. In the variety of such arrangements the result is always the same, namely, possession and control of warehouse facilities available to serve whatever *competitive* purposes railroad management may have in mind." (R. 35)[1]

[1] Emphasis supplied here and in all other quotations in this brief.

After reviewing the warehousing activities of the seven carriers in some detail, pointing out many instances of storage, handling and insurance at below-cost rates, the granting of free services and unwarranted allowances, the renting or leasing of warehouse space and in some instances of entire warehouses at unduly low and noncompensatory rentals, and other wasteful practices (R. 42–96), the Commission found that appellants' motive "in engaging in the commercial business is to induce shippers to use their rail facilities, and thereby increase the volume of traffic over their respective lines." (R. 105)

Directly or through their dominated and controlled subsidiaries, they "seek out the larger shippers and offer them lower rates for warehousing services and warehouse space than the private warehousemen." (R. 105) While they charge all shippers alike the tariff rates for rail transportation (R. 108) the lowering of their warehousing charges lowers the aggregate charge for transportation and warehousing, and such aggregate charge "influences shippers to route their freight via the railroad and through the warehouse that exacts the lowest aggregate charge for the two services." (R. 36)

The competitive situation resulted in reducing the carriers' warehousing charges to such a low basis that they became far below their costs of fur-

nishing the service, and large revenue losses resulted. (R. 111–115)

The losses during one year, 1931, the Commission found, from the operation of the carriers' warehouse and storage operations aggregated $1,260,441. (R. 112, 115)

The losses from their storage in the New York district of goods stored under the storage-in-transit privilege during the year 1931 ranged from $1.28 to $6.18 per ton. (R. 112, 115) In some instances this loss from the storage operations in New York reduces by more than half the carriers' line-haul rate for the transportation of the goods, and in other instances the loss is so large that no revenue whatever is left from the line-haul transportation. (R. 48–49; 146; 182–183)

The appellants, the Commission found, are little concerned "that the charges for the warehousing services and space furnished are not compensatory, *because they expect to recoup any losses through the revenues derived from rail transportation.*" (R. 105)

The Commission found that the seven trunk-line respondents "have extended financial aid to their various warehouse affiliations." (R. 97) The complaining warehousemen, referred to as the complainants, contended that this aid amounts to subsidies and rebates and subjects them to unjust discrimination and to undue and unreasonable

prejudice and disadvantage, and makes it impossible for them to solicit or handle any business without taking into consideration the respondents' storage practices, rates, and charges, *and meeting these on a competitive level.* They contended that they are precluded in practically all cases from meeting the less-than-cost rates for storage, handling, and insurance, *which respondents offer as an inducement to secure traffic for their lines.* (R. 97)

The Commission found that "It is well understood that the controlling fact in the mind of a warehouse patron is the aggregate cost of the transportation and warehouse services, and the assumption of any part of the warehouse charges by the carrier enables the warehouse performing the service to offer rates which complainants cannot meet." (R. 97)

After observing that "the solicitation of goods for warehousing is an important activity in the conduct of the business," the Commission found that "respondents have and use their active and efficient traffic departments for the solicitation of business throughout the country," while the complainants, with their smaller forces, cannot compete in this respect. (R. 97)

Complainants contended that a large part of the value of their warehouse properties has been confiscated and destroyed by the practice of the trunk lines, in what they consider (and what the Commission found to be) trade activities and not common-

carrier service. The Commission found that complainants "offered testimony and exhibits, *neither of which was refuted by respondents,* which show that they have lost business in practically every form of warehousing to the respondents' affiliated warehouse and storage companies." (R. 97–98)

The complainants claimed that participation of the railroads in warehousing is destructive in the same degree to their (the railroads') competitors therein as it would be destructive to manufacturers of any commodity which the railroads might attempt to manufacture, for the reason that the railroads are not dependent on profit arising from their warehouse activities. Complainants also pointed "to the large financial losses of respondents in their warehouse activities, and to the fact that they can use their freight revenues to offset their losses which the competing warehouses cannot do." (R. 98)

Warehousing and storage, the Commission found, are highly specialized businesses, as many commodities must be segregated and many require special equipment in handling. A commercial warehouseman can choose the commodities he wishes to store, as it would not be practicable for any company to build many special-commodity warehouses to store any and all commodities offered. "The tenor of complainants' testimony was to the effect that the competition of the railroads would ultimately drive independent warehousemen out of business, with

the result that railroads would then be called upon to deal in all of the various forms of specialized storage." (R 98)*

Distinguishing between storage, which is within the meaning of the term "transportation" as used in section 1 (3) of the Act, and within the duty of the carrier to perform under section 1 (4), on the one hand, and voluntary or solicited storage business, which is beyond common-carrier duty, on the other hand, the Commission said:

> The term "transportation" as used in section 1 (3) of the act includes the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. Under section 1 (4) it is made the duty of every common carrier subject to the act engaged in the transportation of property to provide and furnish such transportation upon reasonable request therefor. While storage of property is clearly within the transportation

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* As a commercial warehouseman, a railroad company's duties and obligations are not those of a common carrier but of warehouseman only. Since commercial warehousing is not "transportation" as defined in section 1 (3), it is not within the purview of section 1 (4) requiring carriers subject to the Act to furnish "transportation" upon reasonable request, cf. *Director General* v. *Viscose Co.*, 254 U. S. 498, 503–504, *Lake-and-Rail Rates*, 29 I. C. C. 45. Therefore the Commission could not require the carriers to furnish commercial warehousing service, nor would mandamus or injunction issue to compel them to do so. Cf. *Louis. & Nash. R. R.* v. *Cook Brewing Co.*, 223 U. S. 70, 83; *Missouri Pacific Ry.* v. *Larabee Mills*, 211 U. S. 612, 619.

> service which carriers are obligated to furnish, their duty under these provisions extends only to that storage which is necessarily incidental to transporting such property. To be incidental business, the storage must be preliminary either to immediate transportation or immediate removal. *State* v. *Southern Pacific Company,* 52 La. Ann. 1882; 28 So. 372; *Guaranty Claim of Central Elevator & Warehouse Co.,* 72 I. C. C. 169. (R. 103.)

"It is clear," the Commission said, "that much of the warehousing or storage services under consideration here and the handling necessary in connection therewith is not storage incidental to transportation but is commercial storage. Compare *Merchants Warehouse Co.* v. *United States,* 44 Fed. (2d) 379, affirmed 283 U. S. 501" (R. 104–105), and "is not such as the carriers are required by the act to furnish." (R. 103)[5]

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[5] The report as a whole makes it clear that all warehousing and storage referred to therein is commercial storage except that performed under the Jones Storage tariff, applicable generally throughout the United States, which names high storage rates, designed to compel consignees promptly to remove their goods (usually l. c. l. lots) from the carriers' freight stations. These storage charges are stated in the report, under the heading "General Storage Charges," (R. 40) and it will be noted they "do not apply on traffic stored in warehouses owned and operated by the carriers exclusively as storage warehouses." In other words, these "transportation" storage charges do not apply at the commercial warehouses operated by appellants.

The general storage charges are infinitely higher than the commercial storage charges—as much as 70 times higher

While holding that it had no jurisdiction to require a railroad to cease engaging in a business or activity not within its duty as a common carrier in interstate commerce, the Commission said a different situation is presented where the performance of such services is so related to the performance of common-carrier duties and of such character as to create a violation of the Act because it is established that in such circumstances the Commission is vested with ample authority, citing *Warehouse Co.* v. *United States,* 283 U. S. 501. (R. 103–104)

The Commission found that the private warehouse companies are "persons" within the meaning of that word as used in sections 2 and 3 of the Interstate Commerce Act, and the charges which they are required to pay and the treatment they are accorded by carriers subject to the Act are subject to the provisions of these sections, as well as the provisions of the Elkins Act, and as shippers they are

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on 100-pound bags or sacks stored one month under the westbound storage-in-transit privilege: 70.5 cents as against 1 cent. (R. 40)

The carriers do not file their *commercial* warehousing rates with the Commission, except those covering the storage, handling, and insurance under the storage-in-transit privilege.

Cf. *Cleveland & St. Louis Ry.* v. *Dettlebach,* 239 U. S. 588, and *Southern Ry.* v. *Prescott,* 240 U. S. 632, which are examples of storage incidental to transportation, of the involuntary type, due to the failure of the consignees to take prompt delivery of the goods after arrival at destination.

to be dealt with in accordance with the provisions of the Act, citing *Warehouse Co.* v. *United States, supra.* (R. 109–110)

It recognized, however, that the rail carriers are under no obligation to place their charges for warehousing services on a basis which will insure a profit to private warehouses, if the carriers' charges meet the provisions of the statutes. (R. 110)

"But regardless of the effect upon private warehouses the carriers are bound to comply with the law even though such compliance necessitates changes in rates and practices that were designed to attract traffic to their facilities." (R. 110)

The Commission found that the present rates and practices of the rail carriers, as considered in the report, cannot be justified upon the ground that the aggregate charges are not unreasonable as not all shippers are afforded the same aggregate charges for like and contemporaneous services. (R. 110)

The Commission then found that the situation here presented is analogous to that considered by this Court in the *New Haven* case (*New Haven R. R.* v. *Interstate Com. Com.*), 200 U. S. 361, in which the Court reached a negative decision upon the question "Has a carrier engaged in interstate commerce the power to contract to sell and transport in completion of the contract the commodity sold when the price stipulated in the contract does not pay the cost of the purchase, the cost of delivery, and the published freight rates?" This

question, the Commission said, can properly be paraphrased to cover the situation here presented, as follows:

"Has a carrier engaged in transporting commodities in interstate commerce the power to furnish directly or indirectly storage or warehousing facilities not within its common-carrier duty and to act as a private or commercial warehouseman when the amounts received from such storage and transportation are not sufficient to pay the cost of such storage without a concession from the published freight rates?"

"This question," the Commission concluded, "clearly must be answered in the negative, and it follows that if respondents are to continue engaging in such business their charges directly or indirectly for storage or warehousing, and for privileges or services rendered in connection therewith, must be put on a basis which, entirely independent of freight rates, will reimburse respondents for the full costs of such services." (R. 110–111)

The Commission concluded that the respondents' warehousing practices violate sections 2, 3, and 6 of the Act. "Although the carriers charge all shippers alike the tariff rates for rail transportation," the Commission said, "it is obvious that the according of noncompensatory warehousing charges and rental to some shippers and not to all is equivalent to a deduction from the charges for transportation to some shippers and not to others for like and contemporaneous service. This is clearly prohibited

by section 2 of the act. It is likewise clear that the shippers receiving the benefit of such noncompensatory charges are given undue preference or advantage in violation of section 3 (1) of the act, over shippers who have no need of warehousing or storage, or others who for various reasons are compelled to pay the line-haul rate undiminished by any such benefits. These violations are added to in some cases by the free loading and unloading of carload freight, or payment of allowances therefor, and the handling of freight into and out of storage at less than compensatory rates." (R. 108–109)

The Commission further found that these practices lead also to violations of section 6 (7) of the Interstate Commerce Act, and that the evidence of record also affords reasonable ground for the belief that the carriers have violated and are violating the provisions of the Elkins Act. (R. 109)

The Commission then referred to *competitive waste*. It said that "apart from the requirements of the statutes previously discussed, the competitive waste involved in the practices dealt with herein is deserving of most careful consideration." These practices are similar to those considered in *Duplication of Produce Terminals*, 188 I. C. C. 323, wherein the Commission directed attention to the *Fifteen Per Cent Case, 1931*, 178 I. C. C. 539, 585, in which it said:

> The new competitive conditions make it necessary, also, for the railroads to cooperate more efficiently with each other and *re-*

duce the waste, both in service and in rates, which has marked their own competition. That this waste is of very large proportion is clear. Many specific instances have been brought to our attention. That it can be minimized we also have no doubt, * * *. The record shows that in the past decade the railroads have made great strides in improving their service and at the same time operating with greater efficiency and economy. But what they have done in this direction has largely followed lines which developed under conditions different from those which now prevail, and it has been characterized by a continual intensification of their own competition, at a time when as an industry they have new enemies to face, and warfare with each other has grown more bitter, so that *economies in operation have been offset in part by the growth of competitive waste.*

All this is contrary to the spirit of the Transportation Act, 1920. Congress then looked beyond the individual railroad to the concept of a national transportation system. It pointed the way in the consolidation provision to the reduction of competitive wastes. It went to the extreme of removing the barriers of restrictive Federal and State anti-trust legislation which might otherwise stand in the way. * * *

The matters and transactions referred to in the present report, the Commission said, "are further illustrations of serious waste resulting from the

competition of railroads with each other for traffic. The extent thereof is indicated by the statements contained in appendixes I to III. * * * These losses are added to by losses incurred on freight stored on railroad piers, and in cars, on insurance premiums, and from loans and advances. The private warehouse interests estimate the total annual losses to be $3,152,119.63." (R. 112)

"It seems unnecessary," the Commission said "to dwell at length upon the development and results of the situation here presented. The evidence clearly shows that the carriers themselves are fully aware of the situation."

"Whether or not initial advantages may have been realized at one time or another, by individual carriers, *the result is that a preferred group of large shippers are now the sole beneficiaries, and are so at the expense of the carriers and the general shipping public.*" (R. 112–113)

The Commission found "that the respondents' warehousing and storage practices, charges assessed, and allowances made in connection therewith at the Port of New York district dissipate their funds and revenues, are not in conformity with efficient and economical management as contemplated by the Interstate Commerce Act, and are not in the public interest." (R. 113)

The respondents were admonished to take prompt corrective action, and all carriers subject to the Act were admonished that their practices

and charges should be adjusted in conformity with the principles announced in the report. (R. 113) No order was issued at that time.

Rehearing

No order having been issued with the report, the carriers had the opportunity to correct their warehousing practices, so as to bring them into conformity with the law, by voluntary action. Although recognizing the existing evils as pointed out in the report, the carriers failed to comply with the Commission's suggestions for their correction.

By order dated May 6, 1935—about a year and a half after the date of the report—the Commission reopened the proceeding and further hearings were held. A mass of additional evidence was taken and further briefs were filed. June 8, 1936, the Commission issued its report upon further hearing, 216 I. C. C. 291.

In this report the Commission found that while some changes had been made, most of the practices and charges condemned in the prior report had not been corrected. (R. 125)

It was found that the losses from the carriers' warehousing activities referred to in the prior report had continued:

> The present practices and charges, as later shown, result in heavy losses not only to respondents, but also to competitive commercial warehouse companies. (R. 125)

"There is not enough business to fill all of the warehouses in the Port of New York district," the Commission found. "At the time of the further hearing at least 22 warehouse companies operated cold-storage warehouses in that district. Up to the close of the year 1930, the cold-storage industry had placed 33,688,546 cubic feet of refrigerated space on the market in that district, and within a period of three years thereafter warehouses affiliated with the Erie and Pennsylvania placed an additional 8,500,000 cubic feet of refrigerated space on the market. This was an increase of about 25 percent over the amount of space that had been put on the market by all of the public warehouses in that district during the preceding period of 50 years or more. At the time these two warehouses were opened for operation there was an unused occupancy of at least 30 percent of the then existing facilities, and at the time of the further hearing there was less than a 50-percent occupancy. This excess capacity and resulting competition have reduced the cold-storage warehouse rates for handling and storage to subnormal levels. At the time of the further hearing at least 43 warehouse companies operated merchandise warehouses, other than cold storage, in the Port of New York district. During a period of 70 years up to that time, these warehouse companies had placed 20,450,000 square feet of warehouse space on the market in that district, and within six years subsequent

to January 1, 1929, the respondents or their affiliates placed 6,185,000 square feet of new additional merchandise warehouse space on the market, thereby, without commercial need, increasing the capacity at least 25 percent." (R. 125–126)

This was followed by the important finding:

> The record indicates that because of insufficient prospective earnings, it would not have been possible to have raised capital with which to have constructed the new warehouses without the use of railroad credit and funds. (R. 126)

"Because of the competition it is difficult, if not impossible, to adhere to any fixed standard of rates for storage or the rental of space." (R. 126)

The Commission affirmed its prior holding that the "warehousing operations of the respondents, carried on through railroad departments, subsidiary companies, or affiliated companies" are "in all respects voluntary warehousing activities, such as 'are performed throughout the country by commercial warehousemen under and pursuant to their private contracts, arrangements, and dealing with patrons of warehouses.'" (R. 124; compare R. 35–36, 189)

The Commission affirmed certain other important findings made in its prior report (R. 123, 124–125, 126–127), and then considered the warehousing activities of each individual respondent, especially as carried on through subsidiary warehouse

companies, followed, in each instance, by a "Summary of Principal Findings of Fact."[6]

Without attempting here to summarize the many facts found, it may be said, in general, that the Commission affirmed the conclusions it had reached in the prior report, that the appellants, in their warehousing practices at New York, under various circumstances fully described in the report, violate sections 2, 3, and 6 of the Act.

There was separate discussion of "Storage of Eastbound Carload Freight at New York." (R. 176–179)

The Commission then further considered the important subject of storage by the appellants under the westbound storage-in-transit privilege. (R. 179–198)

Further findings as to appellants' storage and incidental services under storage-in-transit privilege granted on westbound traffic

After the first hearing, and in view of findings in the examiner's proposed report, appellants made a cost study which shows, the Commission

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		Summary
[6] B. & O.	R. 128–135	R. 135–136
Lackawanna	136–144	144–146
Lehigh Valley	149–152	153–154
Central of N. J.	154–159	159–160
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New York Central	166–169	169–170
Pennsylvania	170–175	175

The summaries restate only a few of the important facts in each instance and should not be accepted as complete statements to the exclusion of the facts found in the preceding text.

found, that their charges for storage and handling on all commodities were, and on crude rubber and wood pulp, still are, far below the costs incurred in performing the service, as thus determined by the appellants themselves. (R. 186–188)

These studies were made early in 1934 and covered the storage and handling costs on commodities stored by them during the year 1933. Each of the carriers compiled figures showing the cost, including interest on investment (at 5%), maintenance, taxes, insurance, watchmen, light, power, overhead, and incidental items on the warehouse facilities used by it for storage. Then average figures for all of the seven carriers were compiled. (R. 186, 359–361)

Taking rubber, the most important item from a tonnage standpoint, for example, the cost study showed that the average cost for storing 152,746 tons of that commodity during 1933 was 50.46 cents per ton per month. Contrasted with this cost was the carriers' rate of 1½ cents per cwt., or 30 cents per ton, for the first 30-day period or less, and ½ cent per cwt., or 10 cents per ton, for each succeeding 15-day period or fraction thereof. (R. 187, 360–361)

The average handling cost was found to be 44 cents per ton.[1] (R. 186, 361)

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[1] The carriers' handling charge on rubber is 1 cent per 100 pounds or 20 cents per ton.

The Commission's findings regarding handling are summarized in findings Nos. 64–84 of the court below, R. 358–363.

When rubber was stored for one 30-day period and two handlings were necessary, the average cost was $1.3846 per ton, made up as follows (R. 187):

	Per ton
Cost for storing for 30-day period	$0.5046
Handling in	.44
Handling out	.44
Total	$1.3846

Since the rate for storage was 30 cents a ton for one month and the rate for handling in 20 cents a ton and handling out 20 cents a ton, it results that the total charge for a 30-day storage plus the handling was 70 cents a ton, as against the above shown cost of $1.3846 a ton. The carriers' charge is thus 68.46 cents a ton less than their costs according to their own figures.[8]

"In most cases," the Commission said "it is not contended on this record that the rates under the in-transit tariffs compensate the carriers for the cost of storage and handling. No pretense is made that the storage and handling rates on crude rubber and wood pulp are compensatory, and one prominent traffic witness for respondents, when asked if he knew the out-of-pocket loss incurred in the storage and handling of crude rubber testified, 'I know that those things do not in themselves pay for handling the traffic.'"

"Generally speaking, the respondents' position with reference to storage of westbound crude rub-

[8] For further details as to rates, costs, etc., see R. 38–39, 102, 179–183, 185–188, 360–363.

ber," the Commission found, "is that by furnishing the storage some business is obtained for their lines which would otherwise not move thereover. While recognizing that the amounts received for the handling and storage do not equal the cost of those services, they attempt to justify the present practices by claiming the right to offset the storage, handling, and insurance losses against the line-haul revenue. Their position in this respect is directly contrary to the principles announced at page 201 [R. 111] of the prior report." (R. 132)

The Commission found, in connection with the Lehigh Valley, that on crude rubber stored in its warehouse at its Claremont terminal in Jersey City, for 20 months, the storage and handling costs exceed the divisions of the rates received. (R. 182)

"* * * an exhibit of record shows that, on crude rubber remaining in storage for a period of 20 months, the handling cost, and storage cost, which does not take into account any depreciation on the building, exceed the entire amount of revenue which the Lehigh Valley receives as its divisions for transporting crude rubber from shipside to the end of its line at Buffalo, N. Y. In other words, this means that on crude rubber unloaded from vessels and stored at Claremont for 20 months, reloaded, and hauled to Buffalo, *the actual monetary loss for the storage and handling is greater than the division received by the Lehigh Valley for the transportation of the goods.*" (R. 146)

The Commission further found that "A witness for the Baltimore & Ohio introduced an exhibit showing the net revenue per ton received on rubber transported by it during the period from July 1930 to April 1935. The exhibit does not take into account the cost for transporting the freight from New York to destination. It shows that on 148,129 tons of rubber not placed in storage but moved directly from shipside to destination, the Baltimore & Ohio's division of the line-haul revenue was $5.29 per ton. It had left from its division received on 107,823 tons of rubber stored in New York $2.84 per ton. The difference between these figures, $2.45, represents a loss to the Baltimore & Ohio from storing and handling the goods, or expressed differently, cost incurred in performing commercial service on the rubber."[*] (R. 182–193)

Under the carriers' tariffs rubber may be stored subject to the transit privilege for 2½ years. (R. 181, 352) The longer the storage period the greater the carriers' loss. (R. 187, 360) The B. & O.'s loss on rubber stored for one year in the American Dock or Pouch Terminal stores is $4.53 per ton. The Commission found that the total expense to the B. & O. "in connection with the traffic handled into the warehouses, stored for one year, and handled outbound, amounts to $7.06 per ton," while "the revenue collected for such service, including

[*] The aggregate loss on the 107,823 tons referred to, at $2.45 per ton, amounted to $264,166.35.

inbound lighterage, amounts to $2.53 per ton, resulting in a loss of $4.53 per ton. Such loss is absorbed by the Baltimore & Ohio out of its line-haul revenues * * *." (R. 128)

The tariff rate on rubber from New York to Akron is $8 per ton (R. 49). When the storage loss of $4.53 is deducted from this line-haul rate, the amount left is $3.47. Thus, the B. & O. actually transports the rubber from New York to Akron for $3.47, instead of its published tariff rate of $8. In other words, its tariff rate of $8 is cut to $3.47 by reason of its storing goods *for particular shippers* at below-cost rates in these warehouses.

"The desire of respondents to obtain traffic for their lines clearly results in concessions and departures from their published rates prohibited by the act," the Commission said. (R. 183)

The Commission found that "it is established that those persons who are able to avail themselves of storage and handling at the carriers' noncompensatory rates, and whose costs from shipside to destination are thereby reduced by the amount of the difference between compensatory rates and the noncompensatory rates, receive an undue and unreasonable preference or advantage over those persons whose commercial practices will not permit of their placing their goods in storage at New York, but require direct shipment from shipside to destination. Not only is the latter class of persons unduly or unreasonably prejudiced or disadvan-

taged, *but such prejudice and disadvantage extends to all persons who are compelled to pay the carriers' transportation rates which are dissipated by their storage practices.* The provisions of section 3 conflict with the asserted rights of the respondent carriers to deal in the storage of commodities which they transport, and in such dealing to sell their storage at a price less than the cost of that service." (R. 192).

In considering section 6 of the Act, the Commission said, "In the instant case, the carriers sell warehousing services at less than the cost of providing them and absorb the resulting loss in their transportation revenues. Through the publication of tariffs by which they hold themselves out to store and handle goods in their warehouses at noncompensatory rates, the carriers in effect reduce their line-haul rates from shipside to destination on traffic stored in their warehouses. The carriers assume a portion of the cost of commercial warehousing which should be borne by the shippers as a part of the expense incidental to the conduct of their business, and by this device work departures from their tariff rates, in violation of section 6 of the Interstate Commerce Act." (R. 192)

After considering the carriers' below-cost insurance rates and finding similar violations in connection therewith (R. 192–196), the Commission made the following "Summary of Principal Findings of Fact with Respect to so-called 'Storage-in-

Transit', and Services incidental Thereto" (R. 196–197):

1. Each of the seven class I respondent carriers considered herein provides by tariff publication for storage, handling, and with the exception of the Jersey Central, for insurance of carload freight in warehouses, buildings, or piers owned or controlled by it or by companies with which it is affiliated.

2. The storage, handling, and insurance arrangements provided under respondents' tariffs, considered in the discussion herein in connection with the storage of eastbound and westbound carload freight and insurance, are not services incidental to transportation, but are commercial services. Similar commercial services are performed by competing warehouse companies in the Port of New York district, which are not owned or controlled by, or affiliated with, respondents.

3. The tariffs providing said services are a part of a scheme devised to purchase competitive traffic, and through said tariffs the respondents hold themselves out to perform or furnish commercial services under the guise of transportation services.

4. The said tariffs are instruments which work violations of the act * * *. [The omission, as indicated by the asterisks, is of the words "and the services provided by such tariffs are not properly subjects of tariff publication", this part of the finding having been rescinded by the third report.]

5. The respondents deal in and furnish commercial storage, handling, and insurance of goods at rates and charges which do not reimburse them for the full cost of providing such services independent of freight rates thereby assuming a part of the cost of conducting the commercial operations of shippers who store goods in their owned, controlled, or affiliated warehouse buildings or piers.

6. The respondents do not assume or bear any part of the cost of conducting the commercial operations of competing shippers who store goods in warehouses operated by said competing warehouse companies.

This was followed by the Commission's ultimate findings, which read (R. 197–198):

We find that, exclusive of storage and handling directly incident to immediate transportation or immediate delivery of goods, the storage, handling, and insurance of goods under tariff arrangements in warehouses or piers owned or controlled by, or affiliated with, respondent carriers, as described of record and discussed herein, are commercial services provided to certain shippers in interstate commerce at rates and charges which fail to compensate said respondents for the cost thereof.

We further find that the provision by respondents of said commercial storage, handling, and insurance at such noncompensatory rates and charges reduces below the published tariff rates the transportation,

charges paid by certain shippers in interstate commerce, whose goods are so stored, handled and insured, and results in concessions to said shippers to the extent of the difference between the cost of said respondents of providing such storage, handling, and insurance, and the amount which they receive therefor.

We further find that through such storage, handling, and insurance arrangements, and by granting such concessions, the respondent carriers are guilty of unjust discrimination, in violation of section 2 of the Interstate Commerce Act, make and give undue and unreasonable preferences and advantages to certain shippers in interstate commerce, in violation of section 3 of said act, and depart from their published tariffs, in violation of section 6 of said act.

We are not to be understood as here condemning *bona fide* stoppage and storage in transit as permitted generally by carriers throughout the country, for the purpose of milling, manufacturing, or similarly trade processing the commodities stopped or stored.

We affirm our prior findings that the respondents' warehousing and storage practices, charges assessed therefor, allowances made in connection therewith, and the insurance of goods as hereinbefore described in the Port of New York district, dissipate respondents' funds and revenues, are not in conformity with efficient and economical management as contemplated by the Inter-

state Commerce Act, and are not in the public interest.

The order

After the issuance of the report on further hearing, the respondents petitioned the Commission to grant them a third hearing. This was denied but the Commission reopened the proceeding for oral argument and reconsideration. Oral argument was heard by the Commission November 23, 1936.

On February 2, 1937, the Commission issued its report on argument and reconsideration (220 I. C. C. 102), in which it affirmed the findings of the original report and the report on further hearing, except the finding in the latter report that services provided by respondents' so-called "storage-in-transit tariffs" are not proper subjects for tariff publication. Reversing that finding, the Commission held that the rates and charges for these services should be published in filed tariffs. (R. 269)

With this report the Commission made the order of February 2, 1937, which the petition herein seeks to enjoin.

The order requires the seven carriers, respondents in the Commission proceeding,

(a) To cease and desist from permitting shippers in interstate commerce over their lines to occupy space by lease or otherwise in warehouses, buildings, or on piers owned or controlled directly or indirectly by or affiliated with respondents in the

Port of New York District at rates and charges which fail to compensate them for the cost of providing said space,

(b) To cease and desist from storing goods shipped over their lines in interstate commerce or providing storage space to shippers in interstate commerce over their lines for commercial storage of goods, as fully defined in the Commission's reports, at rates and charges which fail to compensate them for the cost of storing such goods or providing such storage space,

(c) To cease and desist from directly or indirectly handling goods incident to commercial storage, as fully defined and described in said reports, at said warehouses, buildings or piers for shippers in interstate commerce at rates and charges which fail to compensate them for the cost of said handling,

(d) To cease and desist from insuring goods shipped over their lines in interstate commerce and stored in connection with commercial warehousing, as fully defined and described in said reports, at said warehouses, buildings or piers in the Port of New York District for shippers in interstate commerce at less than the cost of providing such insurance,*

(e) To cease and desist from applying, by means of tariffs now on file with the Commission, noncom-

* This requirement of the order is not directed against the Jersey Central because the Commission found it does not provide such insurance.

pensatory rates and charges, as fully described in said reports, for the leasing of space, storage, handling and insurance of goods shipped over their lines in interstate commerce, which goods are stored, handled or insured in connection with commercial warehousing service as fully defined and described in said reports.

The order contains a further provision addressed solely to the Jersey Central requiring it to cease and desist from subsidizing and granting concessions to the Newark Central Warehouse Company by means of noncompensatory rentals collected or received for the space leased by the Newark Central Warehouse Company from said carrier.

As issued, the order also required the Erie to cease and desist from subsidizing and granting concessions to the Seaboard Terminal & Refrigeration Company by means of excessive rentals paid for space leased from that company, but the Commission, by order dated April 9, 1937, rescinded this part of the order and reopened the proceeding insofar as it relates to this particular subject matter for further hearing. Therefore, the question of the validity of this requirement of the order is not in issue in this suit.

Findings of fact by court below

Although objecting to the form of appellees' proposed findings of fact (R. 328), appellants did not challenge their accuracy in any respect, and the court below adopted them. (R. 321) These find-

ings, 179 in number (R. 341–402), among other things, show the principal facts found in the Commission's reports.

After several findings as to procedural matters, findings 1 to 17 (R. 341–346), there are stated facts in regard to commercial warehousing in the New York district, findings 18 to 22 (R. 346–347), the general warehousing activities of the railroads, findings 23 to 41 (R. 347–352), the carriers' warehousing practices under the storage-in-transit privilege, findings 42 to 63 (R. 352–358), the rates and costs of storage and handling in connection with such storage-in-transit warehousing, findings 64 to 84 (R. 358–363), the costs and rates of insurance in connection with goods so stored, findings 85 to 99 (R. 363–367), followed by a statement of the Commission's conclusions in respect of the warehousing under the storage-in-transit privilege and the handling and insurance incidental thereto, findings 100, 101, 102 (R. 367–369).

Next is taken up the storage and warehousing practices of the carriers in connection with eastbound traffic, findings 103–117 (R. 369–374).

Finding No. 118 (R. 374) relates to the formula presented to the Commission for the ascertainment of warehousing costs and the rate per annum necessary to secure a fair return per square foot of warehouse space in the Port of New York district. (See first report, R. 41, under the heading "Basis of Computing Rental.")

Next is taken up the warehousing activities of the several railroads, other than storage, etc., under the transit privilege, as follows:

Baltimore & Ohio	Findings	119–128	R. 374–378
Lackawanna	"	129–149	378–387
Lehigh Valley	"	150–154	387–390
Jersey Central	"	155–158	390–393
New York Central	"	159–171	393–398
Pennsylvania	"	172–178	398–401

The Commission's findings in regard to excessive rentals paid by the Erie for space leased from the Seaboard Terminal & Refrigeration Company are omitted in view of the fact that the Commission rescinded this part of its order of February 2, 1937, and reopened the proceeding insofar as it relates to this particular subject matter for further hearing.

The last finding, No. 179 (R. 401–402), relates to the competitive waste resulting from the appellants' warehousing in the New York district.

The record

Appellants do not challenge the findings of either the Commission or the Court below as unsupported by evidence. For this reason it was not deemed necessary to print the evidence before the Commission, which is voluminous, consisting altogether of 3,972 pages of testimony and 302 documentary exhibits. (Findings Nos. 9 and 13, R. 344, 345.) A certified copy of this evidence was introduced in the Court below (finding No. 7, R. 343) and has been transmitted to this Court as an original exhibit, under order of the Court below (R. 423),

but was not designated for printing by either appellants or appellees (see R. 426, 427–428), it being appellees' understanding that this evidence is before the Court as an original exhibit under Rule 10 (4), and that, as such, it may be considered along with the transcript and may be referred to in brief and in oral argument by counsel for any party as though it were printed as part of the transcript.

In the few instances where the testimony before the Commission is referred to herein, the page number of the typewritten transcript is preceded by "Tr."

SUMMARY OF ARGUMENT

The Commission's findings establish that appellants in their own competition for line-haul traffic, cut warehousing storage, handling and insurance rates and space rentals below their own costs and below those of the competitive commercial warehousemen, without regard to "fair value." The Commission found that appellants' motive in engaging in the commercial warehouse business in the New York district is to induce shippers to use their rail facilities and thereby increase the volume of traffic over their respective lines. The aggregate of the charges for transportation and warehousing or storage influences shippers to route their freight via the railroad and through the warehouse that exacts the lowest aggregate charge for the two services. Appellants, having supplied

themselves with warehousing facilties for competitive reasons, sought out the larger shippers and offered them lower rates for warehousing services and warehouse space than the competitive private warehousemen. Competitive warehouse price cutting by appellants brought their rates down to a level below their own costs. Appellants were not concerned that their charges for warehousing services and space furnished were not compensatory because they expected and intended to recoup warehousing losses through revenue derived from rail transportation. Appellants can maintain below-cost warehousing rates because they can draw upon their line-haul revenues to make up the resulting losses, whereas the independent warehousemen, lacking such a revenue reservoir, cannot continue to rent space or store goods at below-cost charges.

Many findings in the Commission's reports upon specific instances show that competition among themselves for line-haul traffic was the only reason for appellants' low warehousing charges. This is true as to the warehousing conducted by appellants through their subsidiary warehouse companies and also as to the warehousing which they conduct directly in their own names of traffic stored under the storage-in-transit privilege as published in their tariffs. The Commission found that the tariffs offering those services "are a part of a scheme devised to purchase competitive traffic." Under the operation of the transit privilege the shipper ob-

tains a refund of the charges for the inbound movement to the warehouse if he ships the goods out over the same line, and therefore the carrier that succeeds in getting a particular lot of freight into its warehouse is practically certain to obtain the outbound rail haul. Each of the seven appellants granted this transit privilege, and each made the same extremely low storage, handling and insurance charges on goods stored in its warehouse subject to the transit privilege. These charges were below costs, and were maintained by appellants to meet each other's competition.

Appellants' contention that the only basic finding which the Commission made was that appellants' warehousing charges are below cost and that the Commission did not find that these charges were below fair value, is erroneous. Many findings in reference to appellants' commercial warehousing activities in general, together with numerous findings upon specific instances, as expressed in the reports, show definitely that appellants did not reduce their warehousing charges in order to meet a previously prevailing market price or to bring them down to what was regarded as fair value determined by some established standard or by going prices, but, on the contrary, that they cut their charges below those of the independent commercial warehousemen and below their own costs to whatever level was necessary to get the business, in their competition one with another, to obtain the line-

haul movement of the traffic, which usually was obtained by the railroad that secured the warehouse business; that appellants' motive in offering and granting these commercial warehousing services at abnormally low charges was the same as that which caused the three competing roads serving Philadelphia to pay the unwarranted allowances to certain warehouses there, condemned as rebates and as causing discrimination against competing, independent warehouses, in violation of sections 2 and 3, in *Warehouse Co.* v. *United States*, 283 U. S. 501; to gain traffic for their respective lines, lower rates for warehousing services and warehouse space than those offered by the competing independent warehouses here being the inducement offered to shippers to accomplish that purpose. "The record plainly shows the struggle between the different rail carriers for supremacy in the matter of inducements without due regard for expenditures and profitableness of the business." (Report, R. 106.)

Appellants have no legal right to maintain commercial warehousing charges that are below costs for the purpose of inducing the movement of competitive traffic over their respective lines, where the effect, as here, is to transport the property in interstate commerce at less than the published rates. None of the decisions cited by appellants establishes that they have such a right. On the contrary, the provisions of the Interstate Com-

merce Act, especially sections 2, 3, and 6, as interpreted by this Court in the *New Haven* case, *Warehouse Co.* v. *United States*, and other cases, deny the existence of such a right. Cf. *Wight* v. *United States*, 167 U. S. 512, *New York Central R. R.* v. *United States*, 212 U. S. 481, *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 444, *United States* v. *Union Stock Yard*, 226 U. S. 286, 301–309.

The sufficiency of the findings is to be determined in the light of the facts and circumstances in each case, and nothing unreasonable in this regard is required. *Florida* v. *United States*, 292 U. S. 1, 9, *United States* v. *Baltimore & Ohio R. R.*, 293 U. S. 454, 462–465, *United States* v. *Louisiana*, 290 U. S. 70, 75–82. In the case at bar, the findings are adequate and fully support the Commission's order.

The order, prescribing costs as the minimum, to correct violations of sections 2, 3 and 6 of the Act, is fully supported by the decision in the *New Haven* case, 200 U. S. 361, in which this Court established the salutary principle, as necessary to give vitality to the provisions of the Interstate Commerce Act against the acceptance at any time by a carrier of less than its published rates, that a carrier may not engage in a trade activity beyond its common-carrier duties and contract to sell a commodity at a price insufficient to pay the cost of the commodity and the published freight rates for its transportation. There the C. & O. sold coal to the New Haven at a delivered price of $2.75 per ton. The cost to

the C. & O. of the coal and the ocean transportation aggregated $2.47 per ton, leaving the C. & O. only about 28 cents a ton for the rail carriage of the coal over its own line, whereas its published tariff rate was $1.45 per ton. This Court held that the C. & O. thereby transported the coal at less than its tariff rate, in violation of section 6 and discriminated against other shippers over its line, in violation of sections 2 and 3. The Commission found that the situation here disclosed is analogous to that considered in the *New Haven* case. The court below concluded that, in giving effect to the remedial provisions of the Act to prevent discrimination between interstate shippers and the granting of preferences either directly or indirectly, it can find no real distinction between furnishing transportation of goods plus commercial warehousing, or insurance, or both, at rates less than those of the published tariffs plus the cost of what warehousing and insurance is furnished and the sale of coal to be delivered at a price which did not cover its cost in addition to the tariff rates for transportation, that in the present instance commercial warehousing, storage and insurance were sold instead of coal, a circumstance creating no difference so far as the principle which controls is concerned.

The below-cost warehousing rates of appellants dissipate their revenues, cause unjust discrimination against particular shippers and against the general body of shippers over their lines, in viola-

tion of sections 2, 3 and 6 and of the purpose of the Act as expressed in section 15a to maintain adequate national railway service. *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 585, *New England Divisions Case*, 261 U. S. 184, 189-190, *Dayton-Goose Creek Ry* v. *U. S.*, 263 U. S. 456, 478, *R. R. Comm.* v. *Southern Pac. Co.*, 264 U. S. 331, 341, 347, *United States* v. *Louisiana*, 290 U. S. 70, *Florida* v. *United States*, 292 U. S. 1, 7–8.

The serious losses resulting from the appellants' warehousing practices at New York, and the competitive waste, found in the Commission's first report, continued thereafter, as shown by the second report. There are several clear indications that unless the appellants' warehousing practices at New York are corrected similar practices will spring up elsewhere throughout the country. Competitive waste is of national concern, *Texas & Pacific Ry.* v. *Gulf, etc., Ry.*, 270 U. S. 266, 277–278, *Colorado* v. *United States*, 271 U. S. 153, 163. It is the primary aim of the policy of the Act as amended to secure the avoidance of waste. *Texas* v. *United States*, 292 U. S. 522, 530.

The Commission, though holding in its third report that tariffs publishing the storage rates and the handling and insurance charges on freight stored under the transit privilege should be filed, affirmed its prior finding that the services under these rates and charges are not transportation services. The Commission expressly made the de-

termination that these services are not within the carriers' transportation duties—such a determination as this Court held in *U. S.* v. *Am. Tin Plate Co.*, 301 U. S. 402, 408, it has authority to make. Its simultaneous ruling that tariffs covering these services should be filed (obviously for policing purposes) is not tantamount to an opposite determination, as appellants suggest.

The fact that appellants' below-cost charges for commercial storage, handling and insurance were published in appellants' tariffs did not prevent them from causing the discriminations and other violations found by the Commission. *I. C. C.* v. *B. & O. R. R.*, 225 U. S. 326, 345, *Warehouse Co.* v. *U. S.*, 283 U. S. 501, 511, *U. S.* v. *Am. Tin Plate Co.*, *supra*, pages 406–407. Whether the charges were published or not, they cover commercial services, and the fact that they were below-cost, coupled with the fact that they were held out as an inducement to attract the movement of competitive traffic over appellants' respective rail lines, with the result that the aggregate charge was not sufficient to pay the cost of furnishing the commercial warehousing services and the appellants' published line-haul rates, was the essential basis for the finding of their unlawfulness. The Commission's order does not require that appellants' commercial services under these tariffs shall be continued, nor that they be discontinued. It does require, if the services are continued, that the charges be brought up to at least

a compensatory basis, and that tariffs covering them be filed with the Commission.

The order for the future rightly corrects the discriminations and other violations of the Act by requiring removal of the means by which they were accomplished. Under section 15 (1) the Commission is authorized, whenever it finds after full hearing that any practice is violative of any provision of the Act, to make an order that the carrers "shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist." Here, the Commission finds that violations exist to the extent that appellants' warehousing charges are below cost. To correct these violations its order requires that appellants shall cease and desist from furnishing the warehousing services, etc., *to interstate shippers over their respective lines*, at below-cost charges. This Court in sustaining the Commission's order involved in *Warehouse Co.* v. *United States*, requiring the carriers to cease paying the discriminatory allowances, said the Commission "rightly secured the discontinuance of the discrimination by ordering the carriers to cease employing the means by which it had been accomplished." (283 U. S., page 513) Cf. *U. S.* v. *Am. Tin Plate Co.*, 301 U. S. 402, 408.

The order, read in the light of the reports as a whole, obviously requires that the appellants shall determine the costs of storage and space rental per square foot and charge prices no lower. The ex-

tent of occupancy of a warehouse at a particular time will not affect this cost on a square foot basis. If appellants are in doubt as to any matter concerning the ascertainment of the costs, their proper procedure is to make application to the Commission for further specifications. *American Exp. Co.* v. *Caldwell*, 244 U. S. 617, 627, *A. T. & T. Co.* v. *U. S.*, 299 U. S. 232, 245, 246, 247.

The order is a valid exercise of the Commission's regulatory power and therefore does not deprive appellants of their liberty or property in contravention of the Fifth Amendment.

ARGUMENT

I.

The Commission's findings establish that appellants in their own competition for line-haul traffic cut warehousing charges and space rentals below their own costs and below those of the competitive commercial warehousemen, without regard to "fair value"

Appellants say at page 7 of their brief that their "position on this appeal is that the findings made by the Commission, taken at their full face value, are insufficient in law to sustain the order. Appellants' assignments of error are all to this effect (R. 407)."

The substance of their argument is as follows. The only "basic" finding made by the Commission is that they make warehouse leases and render warehouse services for shippers at less than cost and that thereby they are guilty of making con-

cessions from their published line-haul transportation rates in favor of such shippers, in violation of section 6 (7) of the Interstate Commerce Act; that such a "bare" finding is insufficient because, even if warehouse leases are made and warehouse services are rendered at less than cost, the difference between the cost and the lower rate or rent cannot legally be a concession unless it is also found that the space rentals and storage rates are below fair value, as measured by the prevailing market and other relevant facts; that the Commission did not find that the warehouse rentals or charges collected by appellants are less than the fair and reasonable value, and hence there are no concessions and there are no violations of sections 2 and 3 of the Act because the only discriminations and prejudice found are those "flowing from the asserted concessions, or section 6 violations." (Brief, pp. 12, 14, 19, 35, 37.)

The principal unsoundness in the argument is that it does not consider the real situation, as disclosed in the Commission's reports, and puts out of view many important, underlying findings which give full support to the Commission's order. It assumes, contrary to the Commission's finding, that when appellants entered into the commercial warehouse business in the Port of New York district they merely made rates to meet the prevailing rates of the independent commercial warehousemen at that time, and have continued their rates on that basis, whereas the Commission finds that in their

own internecine competition they cut warehouse rates and rents not only below their own costs but also below the prevailing rates—that they made whatever rates would get the business in their own competition one with another. It further assumes that the rates generally prevailing in the New York district are below costs, that is, that both the carriers' and the independent commercial warehousemen's rates are below costs, whereas the Commission's findings show that only the carriers' rates are below costs, that they can maintain below-cost warehouse rates because they can draw upon their line-haul revenues to make up the resulting losses, whereas the independent warehousemen, lacking such a revenue reservoir, cannot continue to rent space or store goods at below-cost charges. It asserts that the only finding made by the Commission is that appellants make leases and render services at less than cost, whereas the Commission's findings were far more comprehensive than this. The argument is without merit for the further reason that it asserts the right on the part of appellants to deal in commercial warehousing, beyond their common-carrier duty, to make below-cost warehousing charges for the purpose of inducing the movement of competitive traffic over their respective lines, to draw upon and reduce their line-haul transportation rates in order to recoup the warehousing losses, and thus in effect to transport such traffic at less than the published rates and to discriminate against other shippers,—a right simi-

lar in principle to that denied in the *New Haven* case and other decisions of this Court.

The motive of the carriers in engaging in the commercial warehouse business in the New York District is of primary significance. That motive, the Commission found, "is to induce shippers to use their rail facilities, and thereby increase the volume of traffic over their respective lines." (R. 105) "The aggregate of the charges for transportation and warehousing or storage influences shippers to route their freight via the railroad and through the warehouse that exacts the lowest aggregate charge for the two services." (R. 36) "The lower the aggregate charges for transportation and storage or warehousing services the greater the inducement," but "those engaged solely in the warehousing business must depend entirely upon that business for revenue and profit." (R. 105) They cannot maintain rates below costs. "Obviously," the Commission said, "no independent warehouse could continue to sublease space or store goods at charges below cost." (R. 138)

Moreover, the carriers could not dictate the rates of independent warehousemen. To serve their competitive purposes it was necessary for the carriers to have their own warehouse facilities. They supplied themselves with these facilities by a variety of arrangements and the result was always the same, the Commission found, "namely, the possession and control of warehouse facilities available to serve whatever *competitive* purposes railroad management may have in mind."

They use these warehouse facilities as competitive weapons. Either directly or through their dominated and controlled subsidiaries they "*seek out the larger shippers and offer them lower rates for warehousing services and warehouse space than the private warehousemen.*" (R. 105)

They are little concerned that their charges for the warehousing services and space furnished are not compensatory, "*because they expect to recoup any losses through revenue derived from rail transportation.*" (R. 105)

Wholly incompatible with the intimation in appellants' brief that they merely meet the prevailing market rates is the finding:

> The record plainly shows the struggle between the different rail carriers for supremacy in the matter of inducements without due regard for expenditures and profitableness of the business. (R. 106).

The inducements, among others, were those previously referred to in the report, namely, lower rates for warehousing services and warehouse space than those offered by the private warehousemen.

Again, in the following language, the Commission found that the carriers' warehousing charges were lower than those prevailing at private warehouses (R. 106):

> The conflict of interest applies also as between larger shippers, controlling sufficient

traffic to enable them to use the carrier-controlled warehousing facilities at noncompensatory rates, and smaller shippers who must pay the tariff rates for rail transportation and of necessity use the private warehousing facilities *at higher rates than are charged by the carrier-controlled warehouses.*

"In addition to furnishing warehousing services the rail carriers, or their subsidiaries," the Commission found, "also rent space in stations, piers, or warehouse buildings, to certain shippers for various purposes, *and the rental exacted is not only below the prevailing rates but is noncompensatory.*" (R. 107)

It is apparent upon the face of the Commission's reports that appellants made no attempt to justify their below-cost warehousing charges on the ground that their costs are higher than those of the competing independent warehousemen, and that for this reason they had to cut their charges below costs in order to meet the rates of the independent warehousemen. In the absence of such a contention the Commission would be fully justified in concluding that warehousing charges commensurate with "fair value" would be at least up to the level of costs. The Commission's findings give ample expression to the fact that appellants' below-cost warehousing charges are below "fair value" and benefited the shippers at least in the amount of the difference between the carriers' costs and their lower charges.

For example, in reference to the warehousing activities of the B. & O. as carried on through its subsidiary, the B. & O. Stores, the Commission said that the B. & O., "by bearing the losses of the stores company, provides the concession, which consists of the difference between the transportation rate plus the *real value* of the storage or use of the rented space and the rate at which these are actually furnished." (R. 135) This immediately followed the finding:

> The record establishes beyond question that the Baltimore & Ohio's traffic department dictated many rates which, when applied by the stores company, resulted in the rental of space and storage of goods at prices which, while they obtained line-haul business for the Baltimore & Ohio, were less than the cost of providing the space or services. In other words, the shipper in those instances obtained a concession in storage which affected and reduced the total cost for transportation and storage of the commodities shipped. The effect of such practices upon persons operating competing warehouses has been previously discussed. (R. 134)

In its ultimate conclusions as expressed in its first report, affirmed in its second report, after finding violations of section 2, the Commission found:

> It is likewise clear that the shippers *receiving the benefit* of such noncompensatory charges are given undue preference or advantage in violation of section 3 (1) of the

> act, over shippers who have no need of warehousing or storage, or others who for various reasons are compelled to pay the line-haul rate *undiminished by any such benefits.* (R. 109)

Many other findings appearing in various parts of the reports show the benefits to the shippers and show, as a matter of fact, that the carriers' below-cost warehousing charges were of distinct value to them. In a number of instances, too, the Commission found that the carriers made unwarranted allowances to particular warehousemen, under facts and circumstances similar to those in *Warehouse Co.* v. *United States*, 283 U. S. 501. (See, e. g., R. 79, 108, 168, 169–170, 176)

Further, it is obvious that there would be no inducement to a shipper to route his traffic over a particular railroad and through the warehouse of that railroad unless the warehousing charges of the railroad warehouse were lower than those of competing warehouses. The Commission's reports find as a fact that there were such inducements; that the purpose of the appellants in entering the commercial warehouse business was to increase the volume of traffic over their respective lines by means of lower warehousing rates than the shippers could get at the warehouses of the independent warehousemen. The Erie was the first in obtaining a large new warehouse located upon its rails and served exclusively by it. The Commission, after noting absence of evidence that the Erie or the

Seaboard own any stock of each other, found that "the relations between the two companies were very close as shown by the leasing arrangements, and the evidence shows that the president and other officers of the Erie were greatly interested in the selection of officers of the Seaboard Company *and the tonnage it might bring to the Erie.*" (R. 91) And the Commission found:

> Such an arrangement between the Erie and the Seaboard companies could and doubtless would seriously affect any independent warehouse company operating in competition with them. Evidence shows that storage has been obtained in the Seaboard warehouse at rates far below rates previously paid elsewhere by the owners of the commodities stored. (R. 91.)

To match this arrangement the other New York carriers, competitors of the Erie, arranged for the construction of large new warehouses on their lines, to the end that the aggregate of the line-haul transportation charge and the warehousing charges via their lines would be no higher than via the Erie. The result, the Commission found, whether or not initial advantages may have been realized at one time or another by individual carriers, "is that a preferred group of large shippers are now the sole beneficiaries, and are so at the expense of the carriers and the general shipping public." (R. 113)

But, the independent competing warehousemen could not meet the below-cost warehousing rates of

the railroads, since they have no line-haul transportation revenue to draw upon to make up their warehousing losses.

Competition among themselves for line-haul traffic was the only reason for appellants' low warehousing charges

The competitive situation is accurately reflected by the Commission's findings regarding the operations of the B. & O. Stores. This company conducts a general warehousing and storage business in the B. & O.'s nine-story warehouse building at 26th St. and 11th Ave., New York City (R. 128), and also on the second floor of the B. & O.'s Pier 21, East River, the latter known as East River Stores. (R. 42–43, 128)

Although separately incorporated, the Stores Company "is responsive to, and under the direction and control of, the Baltimore & Ohio. * * * *It is an adjunct of the railroad's traffic department.*" (R. 128) For a number of years after the incorporation of the Stores Company in 1914, its operating practices, "*while conducted with a view to attracting traffic to the Baltimore & Ohio,*" did not differ materially from the practices of warehouse operators in general in the Port of New York district. As then conducted they seem to have resulted in some profit, and apparently the operations would have remained profitable had these practices been continued. But upon the entrance of other carriers into the commercial warehouse

field in the Port of New York district on a larger scale than those of the Stores Company, competition for commercial warehouse business became increasingly bitter. "*After that time the traffic department of the Baltimore & Ohio dominated the management of the Stores Company.*" (R. 129)

"With few exceptions," the Commission found, "freight taken into storage by B. & O. Stores has been restricted to that on which the carrier would get the line haul. * * * the warehouse has been operated for the purpose of securing traffic to move via the B. & O., and that its patrons have been those who receive, or propose to ship, freight over the carrier's lines." (R. 45)

"Exhibits of record, particularly letters found in the files of the Baltimore & Ohio, show the struggle of the management of the Stores Company to continue to operate the warehouse at rates which would permit it to carry its own burden, *but that the desire of the traffic department to secure business for the Baltimore & Ohio resulted in the forcing of warehouse rates and charges to unprofitable levels*, leaving the Baltimore & Ohio to assume the burden of the warehouse operations." (R. 129–130)[10]

In one of these letters, written in November, 1929, the manager of the Stores Company, in full charge

[10] Copies of these letters, obtained by authorized agents of the Commission, who have access to the carriers' files under section 20 (5) of the Act, were obtained and by them introduced as evidence at the hearings. (See R. 31)

of the operations of the warehouse, stated that there had been plenty of business right along, "*yet we have lost money for the past three years due to the fact that the trunk lines here have engaged in a foolish war among themselves,* which has greatly interfered with our business." (R. 131)

After the Lackawanna had built its large warehouse in Jersey City in 1930 (Lackawanna Terminal Warehouse), it made an attempt to get a shipper, the National Cash Register Company, then a tenant of the B. & O. Stores Company, to move into its new building, offering it a lower rental than the B. & O. made. In order to retain this tenant the Stores Company was obliged to make a reduction in its rent of 23 percent. (R. 132)

Speaking of the same tenant, the Stores manager admitted that in the beginning he "had agreed to give him two (2) locations adjacent to the elevator on the platform free of charge to enable him to make separations and to assemble goods for immediate export or local delivery. As time went on, they considerably exceeded this limit and occupied for the most part four (4) bays of our most precious space, and there have been times when they have exceeded this. They are the only tenant in the house that enjoys this privilege." (R. 132)

In June 1930 the manager of the Stores Company advised its president:

> I have been trying for some time to get the business of the General Motors Radio

Corporation, which originates in Dayton and at present is stored at the Bush Terminal. I was informed that they were going to change and that the D. L. & W. people had solicited them strongly, stating that they did not aim to make any profit on their storage business, *and, in fact, the rates they quoted would net them a large loss.* This is one very truthful statement. I quoted him our rates, which he said were higher than the D. L. & W.'s, although I had cut them as far as seemed prudent. Their Agent said the D. L. & W. rates were better * * *.

We have published no tariff since 1921. This was a very carefully prepared one with the rates figured out to give the same yield per square foot on all commodities alike and based on a gross earning capacity of 7½¢ per square foot. We have a number of copies left, but I keep them closely filed in a drawer and do not give them out to the public, for the reason that it gives our competitors a target to shoot at. Whenever possible, I try to obtain these rates, but under present conditions we have not been able to do so *and our statements show that we are carrying on our business at a loss, whereas the volume of it is sufficient to yield a fair profit.* I handed copies of this tariff as affording a safe guide for rate making purposes to Mr. Nat Duke, Vice President of the D. L. & W. (R. 132–133)

In December 1930 the Stores manager advised its president that their revenues had shown a con-

siderable reduction. "This is due to the low rates at which we are forced to handle goods, for in many instances these rates have been dictated to us by Mr. Richardson's office. [Mr. Richardson was then Freight Traffic Manager of the B. & O., R. 132.] By charging at the usual rates, the amount of business we are receiving this fall would ordinarily have netted us a fair profit on our operations, but we have been asked and have had to accept several accounts at rates that bring us out with a considerable loss." The only thing, he said, he "ever refused absolutely to take in was the automobiles they tried to get us to accept more than a year ago at ruinous rates. If we had met the figures that were being charged by several railroads in this city, it would have meant handling the automobiles for about 25% of our usual rates, for which we could not possibly attempt to handle business without losing heavily." (R. 133)

In a letter written on January 10, 1929, the Stores manager stated "These abuses have grown greater year by year and are of benefit to nobody, *except to a very limited line of shippers,* and *the losses sustained thereby have to be borne by the balance of the shipping public.*" He then pointed out (what the Commission well understands) that the "traffic man"—men in the traffic department whose duty, among other things, is to solicit traffic—"knows nothing of the costs or responsibilities of performing services, and usually cares less. His

only thought is of tonnage, irrespective of whether it is going to yield a profit or a loss. One line puts an abuse into effect, and within a month all its competitors do the same. There is a gradual wiping away of railway net earnings, not alone due to inadequate rates, but to needless losses running into millions monthly that the traffic men initiate and maintain." (R. 46)

"As to the new warehouse projects now building or under contemplation on the Jersey side by the Erie, D. L. & W. and Penn.", the manager stated, "I think we can cross these bridges when we come to them. *If we anticipate by reducing our rates to a losing proposition, they will make theirs that much lower.*" (R. 46)

The Commission made the following findings:

"As indicated by the above and other correspondence not here quoted, but of record, the stores company's warehousing revenues were shrunk by competitive price cutting. The operations became unprofitable and in numerous cases accounts for storage and leased space were taken at rates below the cost of the services." (R. 134)

"This correspondence also indicates that the traffic department of the B. & O. was continually pressing the B. & O. Stores to reduce its storage rates *for traffic reasons,* and in numerous cases it appears such rates were actually dictated by that department." (R. 46)

"At East River Stores, goods were apparently taken into storage at what could be obtained for

the service; *'in other words, the rates not being based on anything but what could get the business.'"* (R. 46)

"The correspondence shows also that the manager of the B. & O. Stores on numerous occasions called the attention of officials of the B. & O. to the losses that would be incurred in the operation of storage facilities, and to the performance of services free, or *at rates below the cost thereof,* upon demands of traffic officials *in order to meet the competition of other carriers."* (R. 46)

Aside from "fair value," discussed in the abstract in appellants' brief, the above evidence, which appellants could not contradict, discloses instances—and many similar instances are shown in the Commission's reports—of concessions similar to and as indisputable as that condemned by this Court in *United States* v. *Union Stock Yards,* 226 U. S. 286, in which, speaking of a bonus of $50,000 which the carrier agreed to pay to Phaelzer & Sons, shippers over its line, in order to retain their traffic, the Court said:

> Any other company with which it [the carrier] has made no contract would be compelled to pay the full charge for the services rendered without any rebate or concession. Another company might have a contract for a larger or smaller bonus, and thereby receive different treatment. Certainly as to the company which receives no such bonus there has been an undue advantage given to

> and an unlawful discrimination practiced in favor of Phaelzer & Sons. * * *. It is the object of the Interstate Commerce law and the Elkins Act to prevent favoritism by any means or device whatsoever and to prohibit practices which run counter to the purpose of the act to place all shippers upon equal terms. (*Ibid.*, 308–309)

Many other findings in the Commission's reports upon specific instances further show the competitive situation. Without detailing the facts, which are shown in the Commission's reports, a few of these findings are here quoted.

"The record shows that the railroad's [Lackawanna's] purpose in constructing a warehouse operated through the warehouse company was to attract traffic to its line in competition with the other trunk lines, and that the incorporation of the warehouse company was in furtherance of that purpose and devised in an attempt to evade certain regulations to which the Lackawanna as a common carrier by rail was and is subject." (R. 136–137)

"The Kraft company through its control of a large volume of traffic, has, since January 1929, been able at all times to obtain space for its operations at rates which are wholly noncompensatory to the railroads' warehouse companies. The granting of concessions by carriers through the leasing of space at rentals less than its fair value is as un-

lawful as any other form of rebating. *Cleveland, C., C. & St. L. Ry. Co.* v. *Hirsch*, 204 Fed. 849; *Central of Georgia Ry.* v. *Blount*, 238 Fed. 292." (R. 141)

"Intensive traffic solicitation is conducted by the Lehigh Valley traffic and other departments to obtain business for tenants who occupy space in the building in order that the Lehigh Valley may benefit by the movement of traffic over its line." (R. 149)

"It was the original intent that the operation of the Starrett Lehigh and Bronx Lehigh buildings would attract traffic to the Lehigh Valley, and the intention is carried out at present. The failure to collect rentals from persons who use the Lehigh Valley in transporting their shipments results in the same situation as to both the shipper and the Lehigh Valley as the failure to exact compensatory rentals." (R. 152)

"The Newark warehouse was constructed and financed by the Jersey Central as a medium through which traffic would be attracted to its line. Traffic solicitation and advertising for the warehouse company emanate from the freight-traffic department of the Jersey Central in connection with the railroad's traffic information." (R. 155)

"The record is conclusive, however, that the [Newark] warehouse is an adjunct of the railroad's traffic department, and that the latter has made

continuous and intensive efforts to solicit traffic over its line for storage in the warehouse." (R. 155)[11]

[11] In their brief, page 4, appellants say, respecting the Commission's findings as to leases, that those made with respect to the Jersey Central are representative of all the others, and they thereupon quote (page 5) three of the five paragraphs of the Commission's "Summary of Principal Findings of Fact" in regard to the Jersey Central's lease of its Newark warehouse. Even the full summary does not restate all the important findings made in regard to this lease. See first report (R. 53–54) and second report (R. 154–159). These findings show that the Jersey Central leased this building, constructed at a cost of over a million dollars (R. 155) to the Newark Central Warehouse Company, a shipper in interstate commerce over the lines of the Jersey Central (R. 157, 158, 160), at a rental of only $5,000 a year plus percentages of the profits, if any (R. 156), that the actual amount of the rental during the first year of the occupancy was $17,217, slightly less than one-half of the taxes paid by the Jersey Central on the building for that period, which were approximately $35,000 annually (R. 157), that the warehouse company obtained storage business by offering storage rates and handling charges averaging 48 and 63 percent, respectively, below the storage rates and handling charges of a competing warehouse in Newark (R. 158). This leasing arrangement is evidently a competitive measure, for it is obvious that the Jersey Central could not obtain competitive line-haul transportation if the warehousing costs when the traffic was shipped over its line were less favorable than over competing lines.

The Commission found *inter alia* that:

"Through this leasing arrangement, the Jersey Central, through its subsidiary warehouse company, subsidizes the Central Warehouse Company and places it, a 'person' within the meaning of that word as used in sections 2 and 3 of the Act, in a position of superiority over other such per-

"A large tonnage of flour is received by rail at the Port of New York, and is there held for distribution throughout the thickly populated surrounding sections. Storage of such flour is therefore a commercial necessity, and a large reserve supply must be at all times available. Flour is desirable traffic from the respondents' standpoint, and there is intense competition between them for its transportation. Under such circumstances the dealers and persons interested in the handling of flour have been, and are, able to secure concessions for storage, which reduce, and in some cases nullify, their cost for that trade necessity, and the respondent carriers have willingly or unwillingly assumed the burden of the storage expense." (R. 176)

"It appears clear that the interest of the Pennsylvania in the warehousing and storage facilities [of its subsidiary the General Cold Storage Company] was to meet the storage rates of its competitors." (R. 70)

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sons engaging in the warehouse business and thus permits it to underbid such other competing persons for storage of shipments transported in interstate commerce. * * *

"Subsidies in the form of noncompensatory rentals for space occupied are the equivalent of allowances paid in money and in either case if paid for services not a part of a carrier's obligations are unlawful concessions. As also clearly indicated in *Merchants Warehouse Co.* v. *United States*, *supra*, a further violation of the Act results from the unjust discrimination and undue prejudice against persons operating warehouses in competition with the persons operating the warehouses which receive such concessions." (R. 158–159.)

"* * * the construction of this warehouse [Lackawanna Terminal] is a railroad venture, designed to compete with the other trunk lines, and to attract traffic to the Lackawanna, * * *." (R. 74)

"In 1930 the Lackawanna began negotiations to rent space on this pier to the Quaker Oats Company in an effort to draw traffic, which at that time was moving over the Jersey Central, to its line. The Oats Company did not consider the location on Pier 41 desirable and could not be induced to move except by the offer of an extremely low rental and the making of extensive alterations which it considered necessary to meet its purposes." (R. 76)

"Without reviewing in detail the discussion of the arrangements between the New York Central and the Auto Storage and Mellish companies, as set forth in the prior report, it should be recalled that the purpose of the New York Central in entering into the arrangements was to increase traffic over its line. The New York Central recognized that losses would thereby result, and intended to absorb such losses in the line-haul revenue on traffic which it hoped would be increased through traffic solicitations of the Auto Storage and Mellish companies." (R. 168)

"The need for this building [New York Central Kingsbridge Warehouse in which space is leased to the Auto Storage Co.] from a standpoint of retaining and securing carload traffic was explained

to the President of the carrier by one of the Vice Presidents in a letter of January 21, 1929, when, speaking of the competitive situation, he said: 'This situation has not been serious from a traffic standpoint until recently when the Lehigh Valley, Erie and DL&W railroads have been active in soliciting this character of traffic. Each of these three lines has constructed a number of unloading tracks and platforms and at the present time the Lehigh Valley is constructing a large warehouse for storage purposes. There are a number of warehouses available for storage in the vicinity of the Erie Terminal and the DL&W has announced its plan to construct a warehouse for the storage of automobiles. In view of these activities we deem it necessary, in order to protect the traffic we are now enjoying, and to be in a position to obtain additional traffic, to provide adequate unloading facilities and warehouse storage at Kingsbridge.' "[12] (R. 77)

[12] The Commission's reports make it clear that the New York Central constructed this warehouse, at large expense, to meet the competition of other lines for the line-haul automobile traffic, and immediately leased space in the warehouse at a rental which its own estimates showed was below cost, to a storage concern of its own selection, and further made allowances to this concern for unloading carload traffic, and a part of the consideration was the storage company's agreement to solicit traffic for the New York Central. The Commission said: "It has been shown that the New York Central expected to incur a loss from the storage operations, but it was felt that this loss would be justified by the increased traffic. The prospective loss from the opera-

"Notwithstanding the fact that many of the losses shown herein had occurred before 1930, the Erie in order to obtain traffic for its line, was then considering and planning for additional storage space during the next five years. It felt that the need for such facilities would increase and that by securing space industries would locate thereon that would favor the Erie with traffic. As one official stated the proposition, 'Our traffic is going to be influenced by the facilities available. The fact that railroads are now increasing the storage time on some traffic indicates a longer time for the railroad to assume the burden.' Further, it was pointed out that Erie competitors were either building or had just completed extensive warehouse facilities, and it felt that it had to do likewise in order to hold and obtain its share of the traffic." (R. 96)

Storage under transit privilege

In its summary of principal findings with respect to so-called storage in transit the Commission found that the tariffs offering these services "are a part of a scheme devised to purchase competitive traffic." (R. 196) The operation of the tariffs publishing the transit privilege illustrates this.

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tions of the building was intended to be covered out of the line-haul revenue." (R. 80) Thus this arrangement is within the condemnation of three decisions of this Court, the *New Haven* case, *supra*, the *Sheldon* case (*Lehigh Valley R. Co.* v. *U. S.*), 243 U. S. 444, and *Warehouse Co.* v. *U. S.*, 283 U. S. 501.

For example, crude rubber in carload lots, moved by the B. & O. from shipside in New York Harbor to a warehouse in the Port District for storage, is charged at an inbound local rate of 14 cents per 100 pounds. If subsequently reshipped *over the B. & O.* to Akron, Ohio (a typical destination), a rate of 40 cents per 100 pounds is collected, and, since that rate is applicable from the shipside as well as from the warehouse, the local inbound rate of 14 cents is refunded, resulting in the application of a net through rate of 40 cents. If the outbound shipment is made after the expiration of the designated time limit *or is forwarded over the line of a carrier other than the inbound rail carrier,* the inbound and outbound movements are treated as local shipments and the separate rates to and from the warehouse are applied, resulting, in the case of crude rubber to Akron, Ohio, in rates of 14 cents to the warehouse and 40 cents from the warehouse, or a total of 54 cents. (R. 353)

Under this arrangement, it is obvious that if a carrier succeeds in getting a particular lot of freight into its warehouse, it is practically certain to obtain the outbound rail haul, since the shipper thereby obtains a refund of 14 cents per 100 pounds.[13]

[13] As frankly stated by the Freight Traffic Manager of the B. & O., that carrier figures that so long as the shipper has 14 cents per 100 pounds coming to him if he ships the freight out over the B. & O., it has the traffic "hog-tied" to its line. (Tr. 2788)

Each of the seven appellants granted this transit privilege, and each made the same extremely low storage, handling and insurance charges on goods stored in its warehouse subject to the transit privilege. Each carrier was forced to make the same below-cost storage, handling and insurance charges as the others, to the end that the aggregate of the warehousing and line-haul transportation charges over its line would not be higher than over the competing lines.

The B. & O., to meet the competition of the other lines, leased space in the warehouses of the American Dock Stores and Pouch Terminal Stores on Staten Island, for storage of this westbound freight. The carrier knew that this arrangement would result in heavy losses to it but felt it was necessary to maintain its "position among the other lines and obtain satisfactory results from a solicitation and traffic producing standpoint." (R. 48).

Officials of the B. & O. investigated the costs in advance and estimated the ensuing losses. These estimates, the Commission found, "indicate that *practically the entire revenue from the line haul* [on rubber from New York to Akron, Ohio] *would be dissipated* in terminal operations [in New York], due principally to storage and labor incident thereto." (R. 49)[14]

[14] The General Freight Traffic Manager of the B. & O. testified at length regarding this arrangement. (Tr. 2764–2846) On cross-examination he expressly admitted what was already apparent from his direct testimony, namely,

The storage-in-transit privilege is applicable at the warehouses of the American Dock and Pouch Terminal stores, in space of the warehouse company other than that leased by the B. & O., so that whether or not the storage itself is conducted by the railroad company or by the independent warehouse company, the privilege is the same and the through rate is applicable in the same manner. (R. 38, 355–356, cf. Tr. 2795–96) The storage and handling rates of the warehouse company are, however, much higher than those of the railroad. (Tr. 3904) The railroad was forced to rent the space so that it could perform the storage at the same below-cost rates of the other railroads, in order to meet their competition.

"It is established beyond doubt," the Commission found, "that each of the respondent carriers, *in attempting to stimulate traffic for its line,* under the guise of storage-in-transit tariffs, provides commercial storage and handling to certain persons for less than the cost of those services. The respondents thus reduce the transportation rates to such persons to the extent of the difference between the sale prices of the storage and handling and the cost thereof." (R. 191)

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that the competition of the other New York railroads forced the B. & O. into the leasing of space in the American Dock Stores and Pouch Terminal Stores. "We could not," he testified, "sit idly by and see our competitors take the cream of our traffic away from us, and we were forced to adopt some expedient to meet this situation." (Tr. 2774)

"We are not to be understood as condemning bona fide transit arrangements, but only the practices here considered by which the carriers, *through stress of competition*, have assumed by tariff publication a part of the costs of strictly commercial storage and handling of goods." (R. 190)

Handling

The same competitive reason accounted for appellants' below-cost handling charges. It has been previously mentioned that the appellants' average handling cost, according to their own computation, is 44 cents per ton, whereas their uniform charge to the shippers on crude rubber and wood pulp (the two principal commodities stored by them under the so-called westbound storage-in-transit privilege, (R. 180, 187) is 20 cents a ton—less than half the cost.

It should be noted that several of the appellants employ stevedores to perform this handling. This is true of the Lackawanna, the Lehigh Valley and the Pennsylvania. The rate paid by the Lackawanna for handling at its Hoboken and Jersey City piers, which is done by contract labor, is 35.9 cents per ton. The Lehigh Valley pays the stevedores employed to perform all handling at its Claremont terminal in Jersey City 34.5 cents per ton. The contract rate paid by the Pennsylvania for handling at its Greenville pier and Piers K and L, at Jersey City, is 40 cents per ton. (R. 359)

The Lackawanna uses space in its Jersey City warehouse (Lackawanna Terminal Warehouse) for storage under the transit privilege. "The freight is ordinarily picked up at points in New York Harbor, either at docks or from steamships, and is frequently held at the warehouse for a year or more, and later forwarded to its destination. All handling of freight at this warehouse is done by the warehouse forces and charged to the railroad. Under its published tariff the railroad charges 20 cents per ton for handling the freight into and out of storage, but pays the warehouse 58 cents per ton, or a total of $1.16 per ton for two handlings to perform the service, and absorbs the difference of 96 cents per ton." (First report, R. 74–75, cf. second report, R. 136.)

In each of the above instances, it will be noted, the rate paid by the carrier is substantially higher than the rate it charges the shipper; and the carriers' cost is definite. (See court findings 64–69, R. 358–359.)

Insurance

The same competitive motive accounts for appellants' below-cost insurance charges. A word of explanation as to this insurance is necessary. The liability of a carrier engaged in commercial storage is of course not that of common carrier but of warehouseman only, and as such warehouseman the carrier would be liable only in case of negligence. Where an owner of goods stores them in a commer-

cial warehouse he must make his own arrangements for fire insurance and normally he must pay the regular premiums of the insurance company. Appellants, except the Jersey Central, in order to meet each other's competition, besides having become commercial warehousemen have in that connection also taken on the function of writing insurance. By provisions in their tariffs, first published early in 1930, each of the appellants, except the Jersey Central, agreed to assume liability for actual loss or damage by fire to property held by the carrier on storage, at a rate of 8 cents per $100 of declared value per annum, the rate for a period shorter than one year to be in accordance with the underwriters' standard short-rate table. For this rate the carrier assumes liability for fire regardless of its negligence. These provisions were published in the same tariffs that named the storage and handling rates on westbound freight. It was provided in that connection that the storage and handling rates did not include insurance, and that insurance "must be provided by owners of freight at their expense."

Two of the appellants, the B. & O. and the Lackawanna, cover their liability by taking out insurance with regular insurance companies and for this insurance they pay a much higher premium than they charge the shippers. The B. & O. pays a premium of 50 cents per $100 of value per annum on property stored in its Staten Island piers and from 8

to about 15 cents on crude rubber stored by it in its rented space at American Dock Stores and Pouch Terminal on Staten Island. (R. 365) The Lackawanna pays a premium of 35 cents on property stored on its piers in Jersey City.

The other appellants assume the risk without reinsuring. The standard rates of insurance companies on goods stored in the warehouses and on the piers of these appellants range from about 15.3 cents to $1.905 per $100 per annum. (R. 67, 193, 366) The extreme case where the standard rate of insurance companies is $1.905 is that of the Pennsylvania's pier C at Jersey City. (R. 67; finding No. 96, R. 366.) Yet the Pennsylvania, as warehouseman, assumes for the owner and regardless of the company's negligence, liability for actual loss or damage by fire of goods stored on this pier at a rate of 8 cents per $100. The Commission and the court below found that the difference between the rate it charges for this insurance, 8 cents, and the standard insurance rate, $1.905, applied to a carload of rubber weighing 40,000 pounds, of the value of 17 cents per pound or a total of $6,800, is $124.10 per carload per annum. (R. 67, 366)

So that, if the owner were obliged to pay the standard insurance rate on his carload of rubber stored on this pier for one year (and the record shows many instances of rubber stored in the New York district for periods of a year or more, cf. R. 181) his premium at the rate of $1.905 would be

$129.54, whereas under the carrier's rate of 8 cents per $100 the premium amounts to only $5.44, the difference between the two premiums being $124.10.

Thus, the fair value of such insurance would seem to be $129.54 and this is also the established or prevailing rate, and the carrier's charge is $124.10 below that rate. It may be noted in this connection that the carrier's line-haul rate from the New York district to Akron, Ohio, is 40 cents per 100 pounds. (R. 49) Thus the freight charges on this carload weighing 40,000 pounds would be $160. If the concession in insurance to the extent of $124.10 be deducted from the freight charges, the carrier would have left only $35.90.

The Commission's findings show clearly that the *only reason* for these below-cost insurance rates of the appellants was to meet each other's competition. Finding No. 95 of the court below (R. 365–366) summarizing Commission findings, reads:

> The Pennsylvania found on numerous occasions that, because of its high insurance rates on goods stored with it under the storage-in-transit privilege, *'it was unable to compete with the other trunk-line carriers for west-bound storage-in-transit freight.* Although its traffic officials recognized that *"one of the principal reasons the carriers are erecting these expensive modern facilities is to attract business,"* and realized that the insurance rates at the modern up-to-date water-front facilities of the Pennsylvania,

Erie, Delaware, Lackawanna & Western and other New York lines, for storage of transit freight, were much lower than could be obtained at other carrier facilities where the fire hazard was greater, and expressed doubt as to the legality of a uniform insurance rate to meet the competition of the lines with the more modern facilities, and strongly recommended that a uniform insurance rate be opposed by the Pennsylvania, nevertheless the Pennsylvania later became a party to the 8-cent rate *in order to meet competition.*

The action of the Jersey Central in refusing to meet the low rate of the other New York carriers indicates the close association between the line-haul rates and these storage, handling, insurance, and other commercial warehousing rates. The Jersey Central has never been a party to the arrangement agreed to by the other appellants under which they grant insurance at an equalized uniform rate and has at no time itself issued such insurance nor published an insurance rate of 8 cents per $100 of value, for the reason that on account of its short hauls, its rails extending westward only to Scranton, Pa., it receives only a small revenue or division, and cannot afford to assume any losses in connection with insurance. At its piers 11 and 14, Jersey City, in which it uses space for storage of goods granted the storage-in-transit privilege, its insurance rate is $1.29 per $100 of value, and it has refused to lower this rate to meet the rate of 8 cents made by

the other appellants. (Finding No. 98, R. 366–367.)

After the issuance of the Commission's first report, the appellants, through a committee, gave consideration to the subject of insurance. That committee reported to the executives that "as a competitive matter it is necessary that the insurance rates in the warehouses of all railroads be substantially the same." In its report reference was made to the fact that the 8 cents per $100 of value—

> is much below the rates ordinarily prevailing for such insurance, and in instances where the carriers reinsure they are compelled to pay a higher rate and bear the difference. * * * (R. 193)

After making the above findings the Commission stated "No reason for such insurance practices appears, except the competitive feature above mentioned." (R. 194 [14])

The Commission's first report states that the Vice President of the New York Central "cited competition for traffic among the carriers as one of the reasons for building warehouses and the measure of the charges for storage." (R. 99)

"The Vice President of the Lackawanna, with many years' experience as a traffic official who has been active in the promotion of his company's

[14] Other findings of the Commission as to this insurance appear at R. 39, 50, 53–56, 66–67, 76, 112, 192–198, and all are summarized in the findings of the court below, findings Nos. 85–99, R. 363–367.

warehouse activities and is familiar with the general policy of the management, testified that it is reasonable to conclude that the only reason for the Lackawanna's low charges for westbound storage was the competition of other carriers. The witness, speaking of the low charges, stated: 'I don't think any one can say that there is any money to be made out of this, * * * there is no use to beat around the bush, this storage over here does not pay its way.'" (R. 99)

In its second report the Commission, further referring to appellants' position in regard to their below-cost storage, handling and insurance charges, said that, generally speaking, their position with reference to storage of westbound crude rubber "is that by furnishing the storage some business is obtained for their lines which would otherwise not move thereover." "While recognizing that the amounts received for the handling and storage do not equal the cost of those services, they attempt to justify the present practices by claiming the right to offset the storage, handling, and insuranee losses against the line-haul revenue." (R. 182)

As shown in the first report, the carriers made certain increases in their storage rates after the first hearing (R. 102), but they did not increase those applying on crude rubber and wood pulp, which commodities amount to approximately 75 percent of the westbound freight stored at the Port of New York. (R. 180)

Various reasons were advanced by respondents' witnesses for their failure to increase these rates, the principal one being the fear of loss of business to other ports and to other forms of transportation. In this connection the Commission found:

> In 1930 the movement of crude rubber by barges and trucks from New York to Akron, Ohio, was a matter of grave concern to the respondent carriers, and they gave serious consideration to the means they felt should be employed to retain the then existing traffic and secure additional traffic for rail movement. Individual and joint conferences with the large rubber manufacturers located at and in the vicinity of Akron resulted in a so-called "gentlemen's agreement", the effect of which was a reduction by the rail carriers in the rate on crude rubber from New York to Akron from 47 to 40 cents per 100 pounds, effective March 1, 1931, and a reduction in rates on motor-vehicle tires from Akron to New York. In turn, these rubber manufacturers agreed to move their shipments by rail, and this agreement is being complied with. However, considerable rubber has moved by canal or truck to points other than Akron. Witnesses for respondents contend that an increased storage rate, with resultant higher cost for movement from shipside to destination, would break the "gentlemen's agreement", and that the rubber manufacturers would then be free to use competitive forms of transportation. (R. 183)

"The record supports the conclusion," the Commission found, "that shippers of rubber and wood pulp who use storage facilities owned or controlled by respondents were of sufficient importance from a traffic standpoint to successfully resist the imposition of higher storage rates, while shippers of many other commodities were compelled to pay greatly increased storage rates in railroad owned or controlled warehouses or to seek other storage facilities. The record is not convincing that it would be advantageous to shippers to divert a substantial amount of rubber or other traffic through other ports or to other forms of transportation if the storage rates on such traffic should be increased. In any event, fear of such diversion would not justify respondents in violating any provision of the Interstate Commerce Act." (R. 183–184)

The appellants' motive here seems to be about the same as that which caused the New York Central to grant concessions from the published line-haul rates on sugar from New York City to Detroit condemned in *New York Central R. R.* v. *United States*, 212 U.S. 481, namely, to prevent the shippers "from resorting to transportation by the water route between New York and Detroit, thereby depriving the roads interested of the business, * * *." (Pages 490–491) Compare *New Haven* case, 200 U. S., at pages 397–398.

The findings of the Commission, as discussed and referred to above, together with many other find-

ings as expressed in the reports, show definitely that appellants did not cut their warehouse rates in order to meet a previously prevailing "market price" or to bring them down to what was regarded as a "fair value" determined by some established standard or by "going prices," but, on the contrary, that they cut their prices below those of the independent commercial warehousemen and below their own costs to whatever level was necessary to get the business, in their competition one with another for the line-haul traffic, which usually was obtained by the line that secured the warehouse business,—the same competitive motive which caused the three competing roads to pay the allowances to the contract warehouses at Philadelphia: to gain traffic, condemned as rebates and as causing discrimination in violation of sections 2 and 3 in *Warehouse Company* v. *United States,* 283 U. S. 501.

Thus, appellants' contention that the only basic finding which the Commission made was that appellants' warehousing charges are below cost and that the Commission did not find that these charges were below fair value, is erroneous. We agree with appellants that orders of the Commission must be supported by adequate findings, as held by this Court in *Florida* v. *United States,* 282 U. S. 194, 215, *United States* v. *Baltimore & Ohio R. R.,* 293 U. S. 454, 462–465, *United States* v. *Chicago, M., St. P. & P. R. Co.,* 294 U. S. 499, 504, and other

cases. But, as held by this Court in the second Florida case, *Florida* v. *United States*, 292 U. S. 1, 9, reasonable determinations only are required. In several other cases the Commission's findings have been sustained as adequate over contentions as to their insufficiency, including *Georgia Commission* v. *United States*, 283 U. S. 765, 773, *Alabama* v. *United States*, 283 U. S. 776, 779, *United States* v. *Louisiana*, 290 U. S. 70, 75-82, *Ohio* v. *United States*, 292 U. S. 498, 511. The sufficiency of the findings is to be determined in the light of the facts and circumstances in each case. In the case at bar we submit the findings are adequate and fully support the Commission's order.

II

The order, prescribing costs as the minimum, to correct violations of sections 2, 3, and 6 of the act, is fully supported by the principle established in the *New Haven* case

In the *New Haven* case (200 U. S. 361) this Court established the principle that if a carrier engages in a trade activity beyond its common carrier duties and sells a commodity at a price insufficient to pay the cost of the commodity and the published freight rates for its transportation, it violates the prohibitions (section 6, par. 7) of the Interstate Commerce Act against the acceptance at any time by a carrier of less than its published rates, and discriminates against other shippers over its line, in violation of sections 2 and 3.

The essential facts were that the Chesapeake & Ohio Railway had entered into a contract to sell a large quantity of coal to the New Haven Railroad at a price of $2.75 per ton, delivered to the New Haven at ports in Connecticut reached by its line. The C. & O. purchased the coal from mines on its line in the Kanawha district of West Virginia, transported it over its railway to Newport News, Va., and there turned it over to an ocean carrier with whom it had contracted for transportation to the points of delivery. The price of the coal at the mines where the C. & O. bought it and the cost of the ocean transportation from Newport News to Connecticut aggregated $2.47 per ton, leaving the C. & O. only about 28 cents a ton for carrying the coal from the Kanawha district to Newport News, while the published tariff for like carriage from the same district was $1.45 per ton.

In resolving the question presented the Court first considered the purpose of the Act. It said:

> It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that in-

terpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. (Page 391)

The Court then held that the prohibitions of the statute are applicable to *every method of dealing by a carrier* by which the forbidden result could be brought about:

> That a carrier engaged in interstate commerce becomes subject as to such commerce to the commands of the statute, and may not set its provisions at naught whatever otherwise may be its power when carrying on commerce not interstate in character, cannot in reason be denied. Now, in view of the positive command of the second section of the act, that no departure from the published rate shall be made, "directly or indirectly," how can it in reason be held that a carrier may take itself from out the statute in every case by simply electing to be a dealer and transport a commodity in that character? For, of course, if a carrier has a right to disregard the published rates by resorting to a particular form of dealing, it must follow that there is no obligation on the part of a carrier to adhere to the rates, because doing so is merely voluntary. The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be

brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. (Pages 391–392)

The purpose of the statute, the Court held was "to compel the carrier as a public agent to give equal treatment to all. Now if by the mere fact of purchasing and selling merchandise to be transported a carrier is endowed with the power of disregarding the published rate, it becomes apparent that the carrier possesses the right to treat the owners of like commodities by entirely different rules. That is to say, the existence of such a power in its essence would enable a carrier, if it chose to do so, to select the favored persons from whom he would buy and the favored persons to whom he would sell, thus giving such persons an advantage over every other, and leading to a monopolization in the hands of such persons of all the products as to which the carrier chose to deal." (Page 392)

"Indeed" the Court said, "the inevitable result of the possession of such a right by a carrier would be to enable it if it chose to exercise the power, to concentrate in its own hands the products which were held for shipment along its line, and to make it, therefore, the sole purchaser thereof and the sole seller at the place where the products were to be marketed; in other words, to create an absolute monopoly. To illustrate: If a carrier may by becoming a dealer buy property for transportation

to a market and eliminate the cost of transportation to such market, a faculty possessed by no other owner of the commodity, it must result that the carrier would be in a position where no other person could ship the commodity on equal terms with the carrier in its capacity of dealer." (Pages 392–393)

The asserted right of a carrier to become a dealer in commodities which it transports, *"and as such dealer to sell at a price less than the cost and the published rates"* was denied, for the following reasons:

> It is apparent that the construction of the statute which is now claimed by the carriers would, if adopted, not only destroy its entire remedial efficacy, but would cause the provisions of the statute to accentuate and multiply the very wrongs which it was enacted to prevent.
>
> Without a statutory requirement as to publication of rates and the imposition of a duty to adhere to the rates as published, individual action of the shippers as between themselves and in their dealings with the carrier would have full play, and thereby every shipper would have the opportunity to procure such concessions as might result from favoritism or other causes. Interpreting the prohibitions of the statute as it is contended they should be, it would follow that every individual would be bound by the published tariff, and the carrier alone would

be free to disregard it. Thus the statute, whilst subjecting the public to the prohibitions, would exempt the carrier and would thereby enormously increase the opportunities of the latter to do the wrongs which the statute was enacted to prevent.

And the considerations previously stated serve also to demonstrate that the prohibitions of the act to regulate commerce concerning 'undue or unreasonable preference or advantage,' 'undue or unreasonable prejudice or disadvantage' and 'unjust discrimination' are in conflict with the asserted right of a carrier to become a dealer in commodities which it transports, and as such dealer to sell at a price less than the cost and the published rates. Certain also is it, when the reasons previously stated are applied to those prohibitions of the statute the possession of the power by a carrier to deal in merchandise and to sell and transport at less than published rates, would not only destroy the remedy intended to be afforded by the provisions in question, but would cause the statute to fructify the growth of the wrongs which it was intended to extirpate. (Page 395)

The Court further held that, as the prohibition of the Interstate Commerce Act is ever operative, even if the facts established that at the particular time the contract was made, considering the then cost of coal and other proper items, the net published tariff of rates would have been realized by

the C. & O. from the contract, the deliveries under the contract came under the prohibition of the statute whenever for any cause, such as the enhanced cost of the coal at the mines, an increase in the cost of the ocean carriage, etc., the gross sum realized was not sufficient to net the C. & O. its published tariff of rates. *"This must be the case in order to give vitality to the prohibitions of the Interstate Commerce Act against the acceptance at any time by a carrier of less than its published rates."* (Page 398)

Rendered in 1906, the decision in the *New Haven* case is a milestone in the development of interstate commerce law, has never been modified, and has been repeatedly cited with approval in subsequent decisions of this Court, including *Warehouse Co.* v. *United States*, 283 U. S. 501, 513.[16]

The right asserted on behalf of the carrier in the *New Haven* case to deal in commodities and transport them at less than the published rate is essentially the same as that claimed by appellants here, and it seems equally apparent that if a carrier may

[16] Also: *Central Vermont Co.* v. *Durning*, 294 U. S. 33, 41; *K. C. S. Ry.* v. *U. S.*, 282 U. S. 760, 764; *L. & N. R. Co.* v. *U. S.*, 282 U. S. 740, 753; *U. S.* v. *Koenig Coal Co.*, 270 U. S. 512, 519; *U. S.* v. *L. V.*, 254 U. S. 255, 270; *U. S.* v. *D., L. & W. R. R.*, 238 U. S. 516, 529; *U. S.* v. *Union Stock Yard*, 226 U. S. 286, 307; *Chicago & Alton R. R. Co.* v. *Kirby*, 225 U. S. 155, 166; *L. & N. R. R.* v. *Mottley*, 219 U. S. 467, 477; *N. Y. C. R. R.* v. *U. S.*, 212 U. S. 481, 495; *American Express Co.* v. *United States*, 212 U. S. 522, 531; *Armour Packing Co. v. United States*, 209 U. S. 56, 72.

engage in the commercial warehouse business at charges less than its cost for performing the services and draw upon its line-haul revenues to make up the deficiency in the warehousing charges, it possesses a power which no other commercial warehouseman possesses and is thus in a position completely to monopolize the commercial warehouse business along its line, and indeed any similar business it might choose to enter.

In its second report the Commission said:

> It was urged on behalf of the complaining warehousemen that the engagement of the respondents in the business of commercial warehousing would ultimately drive such warehousemen out of business, and result in a monopoly by the respondents of commercial warehousing in the Port of New York district. *There appears to be a basis for their fears,* * * *. (R. 191)

The court below, after observing that in the *New Haven* case "the sale and transportation of coal at less than the cost of the coal plus transportation at tariff rates was held to violate sections 2, 3 and 6 of the Interstate Commerce Act," said:

> In giving effect to the remedial provisions of the Act to prevent discrimination between interstate shippers and the granting of preferences either directly or indirectly, we can find no real distinction between furnishing transportation of goods plus commercial warehousing, or insurance, or both at rates

> less than those of the published tariff plus the cost of what warehousing and insurance is furnished and the sale of coal to be delivered at a price which did not cover its cost in addition to the tariff rates for transportation. In the present instance commercial warehousing, storage and insurance were sold instead of coal, a circumstance creating no difference so far as the principle which controls is concerned. (R. 306–307)

Appellants, attempting to distinguish the *New Haven* case, argue in substance that the price at which the C. & O. sold the coal to the New Haven was less than the market price, that this constituted the concession, without which there would have been no violation of sections 2, 3 and 6. But there is nothing in the opinion that lends support to this suggestion. The contract was for a long term, and in course of time the contract price might have become either higher or lower than the fluctuating market price of coal delivered in Connecticut. Whatever that market price might be, there were violations of sections 2, 3 and 6 of the Act if the *contract price* was insufficient to pay the cost of the coal, the cost of the ocean carriage and the carriers' published transportation rate.

The substance of the holding is that the carrier cannot make up losses in commercial dealing by drawing upon its transportation charges and thereby reducing its published tariff rate. This salutary principle, obviously of great importance,

would seem manifestly to apply to dealings by common carriers subject to the Act in any other article or commodity of commerce and also to commercial warehousing, storage and other activities beyond the carriers' transportation duties.

III

Appellants have no legal right to maintain commercial warehousing charges that are below costs for the purpose of inducing the movement of competitive traffic over their respective lines, where the effect is to transport the property in interstate commerce at less than the published tariff rates

None of the decisions cited by appellants establishes that they have a legal right to maintain commercial warehousing charges that are below costs for the purpose of inducing the movement of competitive traffic over their respective lines, where the effect, as here, is to transport the property in interstate commerce at less than the published tariff rates. On the contrary, the provisions of the Interstate Commerce Act, especially sections 2, 3 and 6, as interpreted by this Court in the *New Haven* case, *Warehouse Co.* v. *United States*, and other cases, deny the existence of such a right.

Appellants' argument to the effect that there is no concession unless it is of value to the shipper overlooks the fact that railroads often grant rebates and concessions, whereby the property is transported at less than the published tariff rate, for their own reasons and for their own benefit, as, for

instance, to meet the competition of other railroads or of water carriers or motor trucks, where the concession or rebate is not of actual value to the shipper because he could get the transportation of his goods by another carrier for the same net charge. This is illustrated by the decision of this Court in *Wight* v. *United States*, 167 U. S. 512. There the warehouse of the consignee, F. H. Bruening, in Pittsburgh, was served by a side track of the Panhandle (now Pennsylvania) which enabled him to get delivery of shipments of beer from Cincinnati at his warehouse at the published rate of 15 cents per 100 pounds without extra charge for drayage. Beer shipped from Cincinnati over the B. & O. to Pittsburgh could not be delivered over this side track and would have to be drayed from the B. & O. station to Bruening's warehouse. To meet the competition of the Panhandle and to attract the traffic to its line, the B. & O. agreed to pay the drayage, amounting to 3½ cents per 100 pounds, with the result that its tariff rate, which was also 15 cents, was cut to 11½ cents. Perhaps this benefited the B. & O., because it enabled it to get the traffic, although at a reduced, possibly non-compensatory rate, but it did not result in any monetary advantage to Bruening because he obtained his transportation over the B. & O. for only what he would have paid had it moved over the Panhandle. Yet there was a clear concession from the B. & O.'s

tariff rate, since the amount it retained was 3½ cents less than its tariff rate. Under appellants' argument this would be lawful, notwithstanding the plain prohibitions of the Act, on the ground that nothing of value passed from the B. & O. to Bruening. Moreover, there was an unjust discrimination against another beer dealer in Pittsburgh, for whom the B. & O. refused to dray.

In *New York Central R. R.* v. *United States,* 212 U. S. 481, the carrier was convicted of granting rebates and concessions upon shipments of sugar from New York City to Detroit, Mich. One of the reasons for giving the rebates was to prevent the shippers "from resorting to transportation by the water route between New York and Detroit, thereby depriving the roads interested of the business. * * *" Perhaps the shippers were not benefited by the rebates, since they could have obtained transportation of the sugar from New York to Detroit at the same net rate that the rail carriers charged (tariff rate minus the rebate) by resorting to the water route. But that was immaterial, in view of the positive command of the statute against transportation by the rail carrier at less than its published tariff rate.

See also *Lehigh Valley R. R. Co.* v. *United States,* 243 U. S. 444; *United States* v. *Union Stock Yard,* 226 U. S. 286, 301–309; *United States* v. *Koenig Coal Co.,* 270 U. S. 512, 519; *Dye* v. *United States,*

262 Fed. 6 (4 C. C. A.); *Spencer Kellogg* v. *United States,* 20 F. (2d) 459 (2 C. C. A.), certiorari denied, 275 U. S. 506; *Armour Packing Co.* v. *United States,* 209 U. S. 56.

Citation of cases in which the rebate or concession was valuable to the shipper does not establish that carriers may transport property in interstate commerce at less than the published rate, contrary to the provisions of the statute, in all instances where they can show that there was no ensuing benefit to the shippers. It usually happens that when a carrier grants a rebate or concession it is of value to the shipper. The findings of the Commission, as above quoted, show that in the present case this was true, that the carriers' below-cost warehousing charges were of distinct and definite value to the shippers, that the below-cost charges were inducements to the shippers to use the rail facilities of the carriers granting them, were lower than they could get from competing commercial warehousemen, who can not maintain below-cost charges.

But, even if it were true, that the below-cost commercial warehousing charges of appellants were of no value to the shippers (on the ground that they could get the same low charges by using warehouses of the independent warehousemen, which the Commission's findings deny), there would still be departures from the published tariff rates, in violation of the statute, since the carriers would have to

draw upon and reduce their published tariff rates to make up their losses resulting from their below-cost warehousing charges made for the purpose of meeting the competition of private dealers in a business in which the carriers are not required by the statute to deal.

Appellants argue that certain previous decisions of the courts and the Commission establish "fair value" as the only lawful criterion and that therefore, as a matter of law, the Commission's order prescribing the cost basis is invalid, citing *Cleveland, C., C. & St. L. Ry. Co.* v. *Hirsch,* 204 Fed. 849 (6th C. C. A.), *Central of Georgia Ry. Co.* v. *Blount,* 238 Fed. 292 (5th C. C. A.), *United States* v. *Northern Pac. Ry. Co.*, 18 Fed. (2d) 299 (D. C., E. D., Wash.), *Leases and Grants by Carriers to Shippers,* 73 I. C. C. 671, *Wharfage Charges at Atlantic and Gulf Ports,* 157 I. C. C. 663.

These decisions, relating to leases of land—surplus land not needed by the carrier in its railway operations—fully sustain the principle underlying the Commission's findings of violations of sections 2, 3 and 6 of the Act, and do not preclude the Commission from making an order prohibiting appellants from going below costs in their commercial warehousing charges, as the proper means to correct the particular situation here disclosed. Nor do they overrule the decisions of this Court in the *New Haven* case, and *Warehouse Co.* v. *United States, supra.*

IV

The below-cost warehousing rates of appellants dissipate their revenues, cause unjust discrimination against particular shippers and against the general body of shippers over their lines, in violation of sections 2, 3 and 6 and of the purpose of the act (section 15a) to maintain adequate national railway service

Appellants below-cost warehousing rates cause unjust discrimination not only against particular shippers but, the Commission found, also against "all persons who are compelled to bear the carriers transportation rates which are dissipated by their storage practices," (R. 192) in violation of sections 2, 3 and 6, as originally enacted in 1887, and also in violation of later enactments broadening the scope and purpose of the regulatory measure, in order, among other things, to develop and "maintain an adequate railway service for the people of the United States." *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, 585; *New England Divisions Case*, 261 U. S. 184, 189–190; *Dayton-Goose Creek Ry.* v. *U. S.*, 263 U. S. 456, 478; *R. R. Comm.* v. *Southern Pac. Co.*, 264 U. S. 331, 341, 347; *United States* v. *Louisiana*, 290 U. S. 70; *Florida* v. *United States*, 292 U. S. 1, 7–8.

The last-cited case explains the amendments to section 15a made by Emergency Railroad Transportation Act, 1933. As there stated, under the amended section "The Commission is to consider, among other factors, * * * 'the need, in the public interest, of adequate and efficient railway

transportation service at the lowest cost consistent with the furnishing of such service'; and "the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.'" (292 U. S. 7) The Court further said:

> The new Act discloses no intention to weaken national control for essential national purposes over the railway system of the country. It is rather designed to aid that control in the light of the depressed economic condition of the railways. (*Id.*, 8)

The term "rates" as used in amended section 15a (2) is defined in paragraph (1) as meaning "rates, fares, and charges, and all classifications, regulations, and practices relating thereto." Thus in considering practices, such as the carriers' warehousing practices here involved, and prescribing a rule of action for the future in connection therewith, the Commission is to give effect to the broad purpose and intent of the amended section

The serious losses resulting from the carriers' warehousing practices at New York, and the competitive waste, "deserving of most careful consideration" (R. 111), have already been shown.

That such losses continued is shown by the second report. See, e. g., R. 128, 134, 137–138, 151–152, 161, 174.

There are several clear indications that unless the carriers' warehousing practices at New York

are corrected similar practices will spring up elsewhere throughout the country. In its first report the Commission mentioned the "active competition and intimate relationship between the various North Atlantic ports, and the necessity of each port offering storage facilities, practices, and charges equal to those at other ports." (R. 33)

The interest of the Boston Port Authority is indicated by its intervention in this suit. It appeared in the proceedings before the Commission seeking to introduce testimony to prove that the practices at New York resulted in undue prejudice and unjust discrimination against the Port of Boston. The inference here is clear—if the below-cost rates, rents, and other warehouse practices continue at New York, the carriers will probably be forced to adopt similar practices at Boston.

Witness Tilly, president of an independent commercial warehouse company in New York, testified that the subject of the carriers "taking merchandise at a mere fraction of the cost", and absorbing the difference elsewhere from other services, is a matter that has concerned his company for many years; that Mr. Spencer, Warehouse Superintendent of the Pennsylvania Railroad, was very much alarmed about the situation as it existed in New York, particularly because of the comparison it made with users of other Pennsylvania Railroad warehouses. Mr. Spencer had charge of all warehouse operations of the Pennsylvania, and there

were certain places where he was charging reasonable rates for storage, and his customers were complaining that the Pennsylvania was giving them an average of 1 cent per 100 pounds in the New York warehouse, while at Pittsburgh, Chicago and elsewhere were charging rates better than 3½ cents per 100 pounds for storage. "Mr. Spencer, together with us and Mr. Quinn of the Pennsylvania, tried to have the matter adjusted, but we got the same answer that I expected at the time, the same answer that I got in talking with each individual railroad, 'Yes, we admit this practice is known; yes, we admit the charges are too low, but since the others charge it we can't correct it.' In that we were joined by Mr. Morton of the B. & O. [Manager, B. & O. Stores] We got no where." (Tr. 1761–1762)

It does not seem likely that the carriers can localize their competition through warehousing at below-cost rates to the Port of New York district. If the practice is sanctioned and permitted to continue there, it seems inevitable that it will spread, with still larger revenue losses which must be made up and paid by the public through increased railroad rates, or, in any event, rates higher than they should be because they bear large warehousing losses.

Competitive waste is of national concern, *Texas & Pac. Ry.* v. *Gulf, etc., Ry.*, 270 U. S. 266, 277–278, *Colorado* v. *United States*, 271 U. S. 153, 163. It is

the primary aim of the policy of the amended act to secure the avoidance of waste. *Texas* v. *United States,* 292 U. S. 522, 530.

V

The Commission, though holding in its third report that tariffs publishing the storage, handling, and insurance rates on freight stored under the transit privilege should be filed, affirmed its prior finding that the services under these rates are not transportation services

Appellants argue under point 3 of their brief, that while the Commission found in its first and second reports that the storage under the transit privilege and the handling and insurance of freight so stored were nontransportation or commercial services, and were not therefore lawful subjects of tariff publication, it reversed this finding in its third report, wherein it held that such rates and charges should be published in filed tariffs, and that this was tantamount to a determination, as under the decision in *United States* v. *American Tin Plate Co.,* 301 U. S. 402, 408, it was empowered to make, that they are "transportation" services within the meaning of sections 1 (3) and 6 (1) of the Act.

It is true the Commission said in its third report that these tariffs should be filed, but in so saying it affirmed the holding in its prior reports that these are commercial warehousing services, not transportation services. (R. 105, 111, 188–191, 271)

Thus the Commission has definitely and expressly made the determination, such as this Court held in the *Tin Plate* case it has authority to make, as to what is or is not transportation; and its simultaneous ruling that the tariffs in question should be filed (obviously for policing purposes) is not tantamount to an opposite determination, as appellants suggest.

In its third report it said: "What is here condemned is the fact that the respondents have voluntarily engaged in storage and warehousing services *which are not within their common-carrier obligations,* and by providing such services to shippers below the cost of such services, reduce the cost to such shippers for the transportation of their goods." (R. 271) Continuing, it said, "The tariffs now on file are instruments which work violations of the Act, in that through them respondents hold themselves out to perform *commercial* services (under the guise of performing transportation services) at rates and charges which fail to compensate respondents for the cost of performing them, and thereby violate sections 2, 3 and 6 of the Act." (R. 271)

Whether the charges were published or not, they covered commercial services, and the fact that the charges were unduly low, coupled with the fact that they were held out as an inducement to attract the movement of competitive traffic over appellants' rail lines, with the result that the aggre-

gate charge was not sufficient to pay the cost of furnishing the commercial warehousing services and the appellants' published line-haul rates, was the essential basis for the finding of their unlawfulness. The Commission's order does not require that appellants' commercial services under these tariffs shall be continued, nor that they be discontinued. It does require, if the services are continued, that the charges be brought up to at least a compensatory basis and that tariffs covering them be filed with the Commission.

The fact that appellants' below-cost rates for storage, handling and insurance on freight stored under the transit privilege were published in appellants' tariffs did not prevent them from causing the discriminations and other violations found by the Commission

Appellants further argue under Point 3 in their brief that the Commission's conclusion that concessions with their ensuing discriminations, preferences and prejudices result from the performance of "transportation" services at less than cost is defective because it ignores the fact that all these "transportation" services are held out by published tariffs and are available to all at the same charges.

The argument assumes that the services in question are transportation services, whereas the Commission found that instead they are nontransportation, commercial services.

Tariffs covering these services were published and filed with the Commission, notwithstanding

they were commercial as distinguished from transportation services, but this fact does not tie the Commission's hands in the making of a corrective administrative order. For the Commission, in the exercise of its administrative authority, can and should look through the form to the substance of a transaction and pronounce it to be what it really is. As said in *I. C. C.* v. *B. & O. R. R.*, 225 U. S 326, 345, "Tariffs are but forms of words, and certainly the Commission, in the exercise of its powers to administer the Interstate Commerce Act, can look beyond the form to what caused them and what they are intended to cause and do cause." In *Warehouse Co.*, v. *U. S., supra,* at page 511, the Court said: "Where a forbidden discrimination is made, the mere fact that it has long been continued and that the machinery for making it is in tariff form, cannot clothe it with immunity." Compare *U. S.* v. *Am. Tin Plate Co.*, 301 U. S. 402, 406–407.

The Commission's findings are to the effect that the below-cost warehousing rates of each of the appellants were published with a view to attracting as much traffic as possible to its warehouses in order to secure the line-haul movement of such traffic over its railroad in competition with the railroads of other appellants, with the knowledge that the warehousing rates were below cost and with the intent of drawing upon and reducing its line-haul rate in order to make up the deficiencies in the warehousing rate. The order has relation to dis-

crimination in *transportation* rates, growing out of the fact that certain shippers are in a position to avail themselves of the unduly low, less-than-cost warehousing rates of the carriers and thus obtain line-haul transportation at rates which are lower than those published in the filed tariffs, while all others must pay the full tariff rate undiminished by the benefits of below-cost warehousing, and pay for the revenue deficiencies caused by the carriers' losses in warehousing, shown in this case to be so substantial in the aggregate as to affect adversely the public interest. It is futile to argue that this discrimination is cured or its nonexistence proved by pointing to the very thing that causes the discrimination.

Moreover, a contention that there is no discrimination because any one can get the carriers' below-cost warehousing services simply asserts that a shipper, having a right to use the transportation facilities of the carrier as a public servant without discrimination in any respect whatsoever, in order to avoid discrimination, must use the carriers' warehousing facilities for his commercial storage.

The contention is unsound in still another respect: It is oblivious to the carriers' duty not to discriminate against independent commercial warehousemen who are shippers over the carriers' lines and "persons" within the meaning of sections 2 and 3 of the Act entitled to the protection afforded thereby. Appellants' contention, if sustained, would leave such shippers exposed to unrestrained

warehouse rate-cutting by the carriers who always have their line-haul transportation revenues to draw upon to make warehousing rates as low as is necessary to get the business.

The Commission found that all shippers whose commercial operations permit them to use the railroads' warehousing facilities and thereby obtain the benefit of their below-cost charges receive an undue and unreasonable advantage over those whose commercial practices will not permit of their placing their goods in storage at New York but require direct shipment to destination (R. 192), and those who store their goods in warehouses operated by competing independent warehousemen (R. 197). There was the further finding that such prejudice and disadvantage extends to all persons who are compelled to bear the carriers' transportation rates which are dissipated by their storage practices (R. 192).

This discrimination is not cured by appellants' holding out their own below-cost warehousing rates to all who will use them. If this were accepted as a cure it would mean that every person shipping goods to and from New York and storing the goods there would have to use the railroad warehouses, and the cure would not be complete until the competing independent warehousemen were completely eliminated and the railroads had an absolute monopoly of the commercial warehouse business in the New York district.

Appellants' argument here merely asserts in another form the right on the part of a carrier to deal in commodities or engage in a nontransportation business and transport at less than its published tariff rate, the possession of which right was denied by this Court in the *New Haven* and other cases and by the Commission in its report in this case.

Since the storage services here considered are commercial, or nontransportation services, the appellants' contention that they may lawfully render *transportation* services at less than cost, or that under some circumstances they may even be compelled to render such service for less than cost, need not be discussed.

VI

The order for the future rightly corrects the discriminations and other violations of the act by requiring removal of the means by which they were accomplished

If, under the facts and circumstances of this case, violations of the Interstate Commerce Act result from the fact that appellants' warehousing rates and charges are below cost, as found by the Commission, then it is within the Commission's power, under section 15 (1) of the Act, to require removal of the violations by directing that appellants cease and desist from charging warehousing rates that are below cost. Unless this is so, the anomalous situation would result that although appellants are violating the Act, the Commission is without power

to compel them to cease and desist from such violations, notwithstanding the provisions of section 15 (1), authorizing the Commission, whenever it finds after hearing that any practice is violative of any provision of the Act, to make an order that the carriers "shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist."

Here, the Commission finds that violations exist to the extent that the appellants' warehousing rates and charges are below cost, and its order that they shall cease and desist from furnishing the services, etc., to interstate shippers over their respective lines at rates below cost is the virtual equivalent of an order requiring that they cease and desist from the violations found.

In the Philadelphia case, *Warehouse Co.* v. *United States, supra,* the Commission found that the granting of the allowances resulted in unjust discrimination and undue prejudice in violation of sections 2 and 3 of the Act, and its order removed the discrimination and prejudice by requiring the carriers to cease and desist from paying the allowances.

This Court said the Commission "rightly secured the discontinuance of the discrimination by ordering the carriers to cease employing the means by which it had been accomplished." (283 U. S., page 513)

In the present case the Commission finds violations of sections 2, 3 and 6 (7) and since these

violations are brought about as a result of the below-cost rates and rents of the carriers, the Commission rightly requires the correction of the violations by ordering that the carriers shall not in the future make below-cost warehouse rates and rents to interstate shippers over their respective lines.[17]

In *U. S.* v. *American Tin Plate Co.*, 301 U. S. 402, and *U. S.* v. *Pan American Corp.*, 304 U. S. 156, this Court sustained orders condemning allowances made for spotting services within large industrial plants. In the *Tin Plate* case it said:

> Since the Commission finds that the carriers' service of transportation is complete upon delivery to the carriers' interchange tracks, and that spotting within the plants is not included in the service for which the line-haul rates were fixed, there is power to enjoin the performance of that additional service or the making of an allowance to the industry which performs it.

Similarly, here, there would seem to be power to enjoin the performance of the commercial ware-

[17] It is significant that the order is not of general application but is strictly limited to the carriers' dealings with interstate shippers over their respective lines.

Cf. R. 148, where the Commission refused to find that the effect of certain noncompensatory storage charges worked departures from the carriers' published transportation charges, on the ground there was no evidence to show that the persons availing themselves of the storage were shippers by rail in interstate commerce.

house services at less than cost, in order to correct the violations found.

Appellants' brief suggests that the order requires rates that will yield a return on the investment in the operation of their warehouses, and depreciation. The Commission's reports find definitely that depreciation is a part of the costs. (R. 174–175) As to return on investment, the order does not require that appellants make warehousing and storage rates and space rentals that will yield a profit. It simply sets *costs* as the minimum. Nothing in the order prevents them from exceeding this minimum, and earning a profit, if they can. Where interest is properly a part of the costs, it is clear it must be included, but there is nothing in the report and order that rigidly requires the original or historical cost of construction of buildings to be used as the basis. Some of the appellants' warehouse buildings were constructed prior to the World War, the newer and larger warehouse buildings were constructed during the period from 1926 to 1934. Under the formula for the determination of revenue per square foot of net space that is needed for profitable warehouse operation, adopted by the American Warehousemen's Association after many years of investigation, the item of rent, or in lieu thereof, the costs incident to ownership, are to be based on present-day or current values, no matter what the terms of the lease or the original cost of the building. (See Exhibit No. 180, page 1.)

If appellants are in doubt as to whether in particular instances interest on investment is to be deemed a profit, or part of the costs, their proper procedure is to apply to the Commission for a ruling. In *American Express Co.* v. *Caldwell*, 244 U. S. 617, 627, this Court said: "If an order is believed to lack definiteness an application should be made to the Commission for further specifications."

It is obvious that the order does not attempt to require what might be impossible, that appellants' warehouses be operated at a profit. The report makes reference to a formula presented by the complaining warehousemen which purports to show the rate per annum necessary to secure a fair return per square foot of warehouse space in the Port of New York district. (R. 41) This and other formulae, which were fully explained, show approved methods for determining the cost per square foot of warehouse space and storage costs. The determination of these costs involve, first, the plant expense, including rent, or, if the building is owned by the warehouseman, such expenses as taxes, insurance, maintenance, and depreciation; second, the cost of operating the warehouse, including salaries and wages, heat, light, office space, and other operating expenses. Dividing the total of these costs by the total number of square feet in the warehouse gives the total cost per square foot of *gross* area. Since the entire or gross area cannot be utilized for storing goods, there must be deducted

the space occupied by stairways, elevator shafts, offices, laborers' rooms, aisles, etc., to determine the net or occupiable space available for the storage of goods; and from the cost for gross area, the cost per square foot of net or occupiable space for storage is determined. In a similar manner the cost per square foot of space rented or to be rented may be determined.

Allowance must be made, however, for unoccupied space, since a warehouseman cannot expect that his warehouse will be 100 percent full at all times. The extent of the occupancy at a particular time does not enter into the calculation. Experience throughout the country over a long period of time indicates that the average warehouse occupancy is 66⅔ percent, and this is used as a basis in determining costs.[15]

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[15] This method of determining costs was exhaustively explained by warehouse experts. Wilson, Tr. 970, 1011–1042; Drake, Tr. 1448–1451; Carruth, Tr. 1626, 1628–1676; Little, Tr. 3896–3919.

In the exposition of "Scientific Rate-Making in Theory and Practice," in Exhibit No. 180, p. 1, after explaining the method of ascertaining "net space," the question of extent of occupancy is considered, as follows:

"Now this net space cannot be kept 100% full at all times. A certain amount must be set aside to provide for special services, such as weighing, sampling, rehandling, inspection of stock, etc. Then there will be space left vacant by failure of lots, as received, to fill entirely the space allocated for their accommodation. Also there will be idle space during dull periods. It is estimated that a 66⅔% average occupancy of net space is a reasonable assumption; con-

Rates based on 66⅔ percent average occupancy would obviously be lower than if based on 50 percent average occupancy. Hence, if the actual average occupancy in the railroad warehouses in New York were 50 percent and not 66⅔ percent, using the latter figure would result in lower costs and, under the Commission's order, lower minimum

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sequently, if the warehouseman expects that his net space will maintain an average occupancy of 66⅔%, it will be necessary for him to charge 50% more for it than he would require in the case of a 100% average occupancy. Thus having ascertained the necessary revenue per square foot of net space, he increases the amount by 50%; and, if the foregoing calculations have been made on a yearly basis, the result is to be divided by 12."

In the cost accounting method entitled "Method of Determining Reasonable Costs in the Merchandise Warehousing Trade," approved by the National Recovery Administration, September 6, 1934 (Exhibit A–64), 66⅔ percent is again taken as the average occupancy:

"A warehouseman can expect an occupancy, averaged through a term of years, of not more than two-thirds of the area upon which he can actually pile merchandise—two-thirds of the 'occupiable space.' This is the 'average occupied space.' For determining the cost per square foot, a factor not less than two-thirds of the 'occupiable space' is used to arrive at the 'average occupied space' over an annual period." (Exhibit A–64, p. 9)

Numerous warehousemen testified as to their costs, comparing them with the warehousing rates of the carriers to show that the carriers' rates were below the carriers' costs and also below the cost of any commercial warehouseman in the Port of New York district. Drake, for example, said that the storage rates of the railroads were below the cost of service level at his warehouse and below that of any commercial warehouse in the Port of New York district. (Tr. 1445)

rates, and presumably this would not be objectionable to appellants, since their desire seems to be to make warehousing rates as low as possible.

In their brief, page 27, appellants say "the Commission's reports seem to contemplate interest and depreciation on investment at some *unstated* rates, and taxes," and in a footnote on page 6 they refer to penalties that may be imposed for violation of the order, wherein, they say, cost is not defined with sufficient certainty. If appellants compile their cost figures in good faith, it is not reasonable to suppose that penalty suits would be instituted. If appellants should be in doubt as to any matter involved in the compilation, conferences and consultations with the Commission and its staff will be available. In the recent decision of this Court in *A. T. & T. Co.* v. *United States,* 299 U. S. 232, sustaining an order of the Federal Communications Commission in regard to accounting, the telephone company contended that the order was vague in several respects, and that the company would be subject to penalties for disobedience. One of the requirements was that charges to certain accounts should be no more than is "just and reasonable." The Court sustained this requirement as not unduly vague, and pointed out that "only if knowingly and wilfully so entered is any penalty prescribed therefor." (Page 246) Under section 16 (8) of the Interstate Commerce Act a carrier is subject to penalties only when it "know-

ingly" fails or neglects to obey an order. At page 245 the Court said: "Penalties do not follow upon innocent mistakes," and, at page 247, "If particular situations shall develop ambiguity or doubt, the Commission will be available for clarifying instructions."

VII

The order is a valid exercise of the Commission's regulatory power and therefore does not deprive appellants of their liberty or property in contravention of the Fifth Amendment

Appellants' contention that the order contravenes the Fifth Amendment is predicated solely upon their contention that it is not supported by proper findings and is therefore an unlawful exercise of the Commission's regulatory power. We submit that the findings are adequate and that the order is valid. The contention is further answered by the decision of this Court in *O'Keefe* v. *United States*, 240 U. S. 294, 304, holding that the contention that "the Commission's order in effect deprives the New Orleans, Texas & Mexico of its property without due process of law, by denying to it the right to contract and compete for traffic originating on the line of the Louisiana & Pacific, is transparently unsound", since

> The trunk line has no constitutional right to build up its business by paying bonuses or rebates that have been forbidden by acts of Congress for considerations affecting the public welfare.

CONCLUSION

It is respectfully submitted that the decree of the court below, dismissing the petition for want of equity, should be affirmed.

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NOVEMBER 1938.

APPENDIX

The Interstate Commerce Act, as amended (49 U. S. C.) provides:

SECTION 1

(3) The term "common carrier" as used in this Act shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this Act it shall be held to mean "common carrier." The term "railroad" as used in this Act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation,

refrigeration or icing, storage, and handling of property transported.

(4) It shall be the duty of every common carrier subject to this part engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this part participating therein which shall not unduly prefer or prejudice any of such participating carriers.

SECTION 2

That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SECTION 3

(1) It shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic, in any respect whatsoever or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

SECTION 6

(7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

SECTION 15

(1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or

will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

SECTION 15A

(1) When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

The Elkins Act (49 U. S. C., sec. 41 (1)) provides:

SEC. 1. * * *

The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand

dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided,* That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. * * *

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SUPREME COURT OF THE UNITED STATES.

No. 133.—October Term, 1938.

The Baltimore & Ohio Railroad Company, et al., Appellants,
vs.
The United States of America, Interstate Commerce Commission, et al.

Appeal from the District Court of the United States for the Southern District of New York.

[January 3, 1939.]

Mr. Justice Reed delivered the opinion of the Court.

The Interstate Commerce Commission entered an order on February 2, 1937, which directed certain carriers serving the Port of New York district to cease and desist on or before April 5, 1937, from permitting shippers in interstate commerce over the carriers' lines from occupying "space by lease or otherwise in warehouses, buildings or on piers owned or controlled directly or indirectly by, or affiliated with" the carriers involved "at rates and charges which failed to compensate said" carriers "for the cost of providing said space." The cease and desist order likewise directed the carriers to abstain from storing, handling or insuring goods for shippers at less than cost. One carrier was also directed to abstain from granting concessions to a warehouse company by means of leasing space to the warehouse company at less than the cost of the space to the carrier.

As authorized by the Judicial Code,[1] a petition in equity was filed in the United States District Court for the Southern District of New York on March 9, 1937, seeking a permanent injunction against the enforcement of the order. A hearing was had by a three-judge court pursuant to the provisions of the Urgent Deficiencies Appropriation Act of October 22, 1913,[2] and a final order dismissing the petition entered on March 23, 1938.[3] An appeal was taken directly

[1] Section 24, subsection 28.

[2] 38 Stat. 220.

[3] For opinion below see Baltimore & O. R. Co. v. United States (I. C. C.), 20 F. Supp. 273.

to this Court as authorized by the Urgent Deficiencies Act and the Judicial Code.[4]

The order appealed from was entered in an investigation into "practices of carriers affecting operating revenues or expenses"[5] undertaken by the Interstate Commerce Commission upon its own motion[6]. For convenience the general investigation was divided into different parts; the one in which the order under consideration was entered is Part VI, "Warehousing and Storage of Property by Carriers at the Port of New York." The particular practices affected by the order were brought to the attention of the Commission by complaints of warehouse operators in the New York district that warehouses owned or controlled by the carriers were being operated contrary to the Interstate Commerce Act. Full reports of the investigation into the practices complained of were made by the Commission on December 12, 1933,[7] and June 8, 1936.[8] The first report terminated in an admonition; the second report was followed by an order which never became effective. This order was superseded by the Commission's order of February 2, 1937, in controversy here. This last order was entered by the Commission upon reconsideration of its former reports.[9] The Commission postponed its effective date until the injunction was brought and the lower court has entered an order for a further stay pending the determination of the appeal to this Court.

While the issues here are matters of law depending on whether admitted facts support the order, it will be helpful for an understanding of the basis of our opinion to have sumarized the underlying facts found by the lower court.

The railroads affected by the order are The Baltimore & Ohio Railroad Company, The Central Railroad Company of New Jersey, The Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, Lehigh Valley Railroad Company, The New York Central Railroad Company and The Pennsylvania Railroad Company. All are subject to the Interstate Commerce Act. As common carriers they operate lines of railroad extending in a gen-

[4] Judicial Code, Section 238.

[5] Ex parte 104, 198 I. C. C. 134.

[6] Interstate Commerce Act, Act of Feb. 4, 1887, c. 104, Sec. 13(2), 24 Stat. 383, as amended; 49 U. S. C. A., § 13(2).

[7] 198 I. C. C. 134.

[8] 216 I. C. C. 291.

[9] 220 I. C. C. 102.

erally westward direction from the Port of New York district to various western points and compete each with the others for domestic and foreign commerce to and from the district. All united in the petition to enjoin the enforcement of the order. Their petition named as defendant the United States of America. The Interstate Commerce Commission and the Warehousemen's Protective Committee intervened. Later, orders were entered allowing the intervention of the American Warehousemen's Association, Merchandise Division; the Boston Port Authority; and the City of Boston.

It was the practice of these carriers to furnish to shippers in the Port of New York area the storage, handling and insurance which were under investigation. On account of the high price and great demand for storage space in the wholesale and retail business locations of New York, dealers must store their surplus stocks in low-rent sections. To serve those merchants who do not have their own warehouse facilities, numerous companies not affiliated with the carriers are engaged in the commercial warehouse business in the immediate vicinity of New York. Their business, like the warehouse businesses owned or operated by or affiliated with the carriers, not only covers the storage of goods but its handling in and out of cars and ships with all the incidental services connected therewith such as the issuance of warehouse receipts, inspection, cooperage, marking, and weighing.

Neither the complaints of the competitors of the carriers in the warehousing business nor the terms of the Commission's order are directed at the involuntary storage of goods incidental to transportation. This is the period before or after shipment during which goods occupy cars or floors without any charge above the strictly transportation rate. The warehousing practices complained of are those in connection with accessorial services of the carriers, accurately designated commercial warehousing. Examples of such services are the storage and other warehousing services furnished by the carriers or their affiliates or subsidiaries, to enable shippers to hold and handle their commodities beyond the time allowed by transportation rates and in ways not required by rail movement itself. All of the carriers "now generally store freight on piers owned or leased by them and in warehouses operated by affiliated or subsidiary companies." This business is carried on in various ways. Some carriers lease space to shippers for warehousing; others have aided in financing structures on their property in which they

lease space from their own subsidiaries; and still others own directly the buildings and lease them to subsidiaries for warehouse operations. In all cases the carriers exercise sufficient control over the warehouse facilities to make them subservient to the competitive needs of the carriers. Their entrance into warehousing was brought about by a desire to induce shippers to use particular rail facilities and as first one and then the other of the carriers gained traffic by their warehouse conveniences, it seemed necessary for their competitors to equip themselves with similar advantages. Obviously a shipper, who can secure transportation, storage, handling and insurance together from a carrier and its affiliates for an aggregate cost which is less than the sum for which he can secure the various services when purchased separately from carriers and non-affiliated enterprises, will deal with those offering the best terms. The storage largely determines the transportation route. To get the rail transportation of large shippers, the carriers sought them out and offered warehousing services and space below the rates of private warehousemen and below the cost to the carriers of the services rendered. It was not only a contest between carriers and private warehousemen but also between the carriers themselves. Traffic departments of the railroads became solicitors for warehousing business. Favored shippers were rented space by the carriers below compensatory figures. To meet the requirements of this competition the various Port of New York railroads added many new buildings in recent years. This provided many millions of square feet of space above the present needs of the district.[10]

Another form of warehousing is found in a development of the storage-in-transit privilege at the Port of New York. The carriers have rules and regulations governing this privilege which are published in separate tariffs filed with the Commission. These tariffs provide that westbound freight in carloads "from points within the free lighterage limits of New York Harbor may be stored in designated warehouses . . . within the Port District, and, if reforwarded by rail within the period specified in the tariffs . . . the through rate . . . from point of origin in New York Harbor to the final destination, will be applied."

As the through rate from shipside and from warehouse is the same, if the shipment moves outbound from the warehouse over

[10] Those interested in the details will find them in 198 I. C. C. 134, 216 I. C. C. 291, 220 I. C. C. 102.

the line of the inbound carrier, a shipper using carrier warehouses has the advantage of port stoppage without extra transportation cost. This tariff arrangement does not affect charges for warehousing services in connection with the storage. The storage is commercial in character and involves large tonnages. While the transportation tariffs permit varying periods of from twelve to thirty-six months for the different commodities, storage may be continued beyond this time limit at the same rate. Prior to October 16, 1934, the tariffs permitted the removal of the commodities stored at any time in any quantity and by any means of transportation without additional charge. On that date an additional charge was provided for withdrawal by means other than over the railroad which granted the storage. It will be noted that in the movement from shipside to a western destination an extra handling of the commodity is required if the warehouse is located directly on the water-front and two extra handlings if the goods must first be transported from the water-front to the warehouse and then loaded into westbound cars. The cost of these extra handlings is borne by the carrier. Insurance is furnished at a level premium rate notwithstanding the variables of the different exposures. All in all, it was determined, and this conclusion is not in dispute, that the warehouse services were performed "at rates and charges which fail to compensate" the carriers for the cost.

Through arrangements permitting distributors to avoid payment of tariff charges for storage, the Commission and the District Court found that the carriers permitted distributors of flour to get unjust and discriminatory charges.

After examining the details of cost of the various carriers for warehousing, both as storage-in-transit and ordinary storage, the conclusion of the Interstate Commerce Commission was that the commercial warehousing was carried on at a substantial loss. The term "commercial warehousing" covers all warehousing practices except those strictly a part of the operation of rail transportation. This phase of the circumstances surrounding the order may be summed up in the words of the 179th finding of fact of the District Court, which reads as follows:

"In its first report the Commission pointed out that the matters and transactions referred to therein 'are further illustrations of serious waste resulting from the competition of railroads with each other for traffic.' The extent of this waste is indicated by state-

ments contained in appendices to the report, Appendix I of which shows that the seven plaintiffs expended approximately $35,000,000 in connection with the warehouse projects considered in the report. In its second report the Commission found that up to the close of the year 1930, the cold storage industry had placed 33,688,546 cubic feet of refrigerated space on the market in the Port of New York District, and that within a period of three years thereafter warehouses affiliated with the Erie and Pennsylvania placed an additional 8,500,000 cubic feet of refrigerated space on the market, notwithstanding the fact that at the time there was an unused capacity of at least 30 per cent of the then-existing facilities; and further that as of the close of the year 1930 the 43 warehouse companies operating merchandise warehouses, other than cold storage, in the Port of New York District had placed 20,450,000 square feet of warehouse space on the market in that district, and that within six years subsequent to January 1, 1929, the plaintiffs or their affiliates placed 6,185,000 square feet of new additional merchandise warehouse space on the market, thereby, without commercial need, increasing the capacity at least 25 per cent. Appendix II of the first report shows that the loss incurred by plaintiffs in connection with their warehouse projects during the year 1931 was $1,260,441. Appendix III shows that the loss per ton of freight stored in transit during 1931 ranged from $1.28 to $6.18. These losses were added to by losses incurred on freight stored on railroad piers, and in cars, on insurance premiums, and from loans and advances. In this connection the Commission found: 'Whether or not initial advantages may have been realized at one time or another, by individual carriers, the result is that a preferred group of large shippers are now the sole beneficiaries, and are so at the expense of the carriers and the general shipping public.' And the Commission found 'that the respondents' warehousing and storage practices, charges assessed, and allowances made in connection therewith at the Port of New York district dissipate their funds and revenues, are not in conformity with efficient and economical management as contemplated by the Interstate Commerce Act, and are not in the public interest.'"

The final order of the District Court, dismissing upon these facts the petition for injunction to restrain the enforcement of the Commission's order, is attacked here upon two grounds: First, that the rendition of services to the public at less than cost is insufficient in law to establish that the carriers thereby make concessions and through such concessions are guilty of the violation of Sections 2, 3 and 6 of the Interstate Commerce Act; second, that the carriers having published and observed tariffs covering storage-in-transit cannot be guilty as to such services of violations of the same three sections.

The carriers contend that the questions involved in charges of violations of the Interstate Commerce Act by discrimination and rebate are to be judged by the reasonable worth of the services rendered instead of by the cost to the carrier and that the charges for storage-in-transit are not warehousing costs but transportation costs and therefore it is no violation of the Act to furnish them at less than cost to the carriers.

Warehousing Charges.—The order, as entered by the Commission[11] and sustained by the lower court, was an exercise by the Commission of its power to cause carriers to cease and desist from practices which result in the receipt of less than the published tariffs for transportation services, with the consequence that concessions were given and preferences and advantages obtained by certain shippers. Its validity, except as it may be affected by consideration of the point that the practices were in accordance with tariffs made and filed with the Commission, depends upon whether a finding that the warehousing services were rendered at a charge

[11] The pertinent language of the order follows: "It is ordered, That the respondent carriers . . . be, and they are hereby, notified and required to cease and desist . . . from permitting shippers . . . to occupy space by lease or otherwise in . . . buildings, . . . owned or controlled . . . by . . . respondents . . . at rates and charges which fail to compensate said respondents for the cost of providing space;

"It is further ordered, That the respondent carriers . . . are hereby . . . required to cease and desist . . . from storing goods . . . at rates and charges which fail to compensate said respondents for the cost of storing such goods or providing such storage space.

"It is further ordered, That the respondent carriers . . . are hereby . . . required to cease and desist . . . from . . . handling goods . . . for shippers . . . at rates and charges which fail to compensate said respondents for the cost of said handling.

"It is further ordered, That the respondent carriers . . . (except The Central Railroad Company of New Jersey) . . . are hereby . . . required to cease and desist . . . from insuring goods . . . at less than the cost of providing such insurance.

"It is further ordered, That the respondent carriers above-named be, and they are hereby, notified and required to cease and desist from applying, by means of tariffs now on file with this Commission on or before April 15, 1937, noncompensatory rates and charges, as fully described in said reports, for the leasing of space, storage, handling and insurance of goods shipped over their lines in interstate commerce which goods are stored, handled or insured in connection with commercial warehousing service as fully defined and described in said reports.

"And it is further ordered, That respondent, The Central Railroad Company of New Jersey, be, and it is hereby, notified and required to cease and desist, on or before April 15, 1937, and thereafter to abstain, from subsidizing and granting concessions to the Newark Central Warehouse Company by means of noncompensatory rentals collected or received for the space leased by the Newark Central Warehouse Company from said respondent carrier, as fully described of record and in said reports."

below cost to the carrier authorized the order, without the further finding that the reasonable value of the service was above the charge.

It was the view of the Commission and the lower court that the finding of the Commission showed a violation of Sections 2, 3(1) and 6(7) of the Interstate Commerce Act.[12] These sections were enacted to assure the maintenance of rail transportation tariffs without rebate, discrimination or preference. No findings appear, nor has our attention been called to any evidence, which suggests the charges were made to meet the competition of the commercial warehousemen or were based upon the fair value of the services rendered, regardless of competition. On the contrary, it was the carriers' struggle to obtain line haul traffic which led them into the price cutting warfare. Charges for leases, storage, both in and out of the transit privilege, handling and insurance were alike slashed to meet the competition.

Since the tariffs for rail haul are fixed for the various points and freight classifications, every shipper must pay that tariff for his transportation. As the shippers of the Port of New York district can utilize, in many instances, commercial storage and other warehousing services in addition to rail transportation, a saving on the

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[12] Act of February 4, 1887, c. 104, 24 Stat. 379, as amended; 49 U. S. C. A. Secs. 2, 3(1), 6(7).

"SEC. 2. If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property . . . , subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation . . . of a like kind of traffic . . . under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

"SEC. 3. (1) It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"SEC. 6. . . . (7) . . . nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

non-transportation services obviously figures out the same as a rebate on the transportation service. It is immaterial that the shipper pays fair value or the market price for the extra privilege he enjoys. Section 6(7) of the Act forbids the carrier to receive less than the published rates for transportation or to remit "by any device any portion of the rates." When services, not necessary for transportation, are furnished below cost in an effort to acquire rail transportation, as was done here, this provision is violated.[13] Since the carrier warehouse rates, as found by the Court and Commission, are not open to all shippers alike[14] there is violation of sections 2 and 3(1) prohibiting discrimination and unreasonable prejudice. The rail transportation rates have charged against them the loss occasioned by warehousing practices designed to attract a volume of rail business.

This is not to say that for every situation it is necessary that accessorial services should be rendered at not less than cost, rather than market or fair value. The Commission pointed out it was not condemning bona fide storage-in-transit for milling, manufacturing or processing,[15] but only the storage practices indulged in here to get rail transportation. In other circumstances fair value and market have been recognized as legitimate bases.[16] Where competitive practices such as existed here are absent, reasonable or market value charges may well be the test. The power, however, is in the Commission, whenever it is of the opinion that any practice is unjust, unreasonable, preferential or otherwise violative of the Act, to prescribe what practice will be just, fair and reasonable.[17] As in *Warehouse Co.* v. *United States*[18] the Commission "rightly secured the discontinuance of the discrimination by ordering the carriers to cease employing the means by which it had been accomplished."

In-Transit Tariffs.—The carriers urge additional reasons why the order is invalid as to in-transit storage. They find in the order as to it all the alleged vices of the order with respect to leases and non-

[13] Cf. Wight v. United States, 167 U. S. 512; Seaboard Air Line v. United States, 254 U. S. 57, 63; N. Y., N. H. & H. R. R. v. Interstate Commerce Commission, 200 U. S. 361.

[14] 198 I. C. C. at 197.

[15] 216 I. C. C. 291, 356.

[16] Leases and Grants by Carriers to Shippers, 73 I. C. C. 671, 683, 684. Cf. Wharfage Charges at Atlantic and Gulf Ports, 157 I. C. C. 663, 692; Central of Georgia v. Blount, 238 Fed. 292, 296.

[17] Sec. 15(1), 41 Stat. 484, 49 U. S. C. Sec. 15(1).

[18] 283 U. S. 501, 513.

transit storage, which arise from basing the minimum charges on cost rather than market or fair value. They also contend that since the charges for in-transit arrangements are and must be published in tariffs, they are a part of transportation costs and therefore may be rendered at less than cost.[19] Even if the in-transit warehousing is not technically transportation, say the carriers, its inclusion in tariffs is sufficient to protect it from the attack that its below-cost charges violate Section 6. The carriers insist that they do not remit by any device any portion of the specified tariff charges and that, as asserted violations of Sections 2 and 3 are predicated upon violations of Section 6, none of the findings as to in-transit charges supports the orders.

The Commission found that the in-transit warehousing was not a part of transportation. This finding is not affected by the determination of the Commission that the rates and charges should be published in the tariffs. Indeed, in its report on the subject the Commission said

"What is here condemned is the fact that the respondents have voluntarily engaged in storage and warehousing services which are not within their common-carrier obligations and, by providing such services to shippers below the cost of such services, reduce the cost to such shippers for the transportation of their goods. The tariffs now on file are instruments which work violations of the act in that, through them, respondents hold themselves out to perform commercial services (under the guise of performing transportation services) at rates and charges which fail to compensate respondents for the cost of performing them, and thereby violate sections 2, 3, and 6 of the act."[20]

We accept this conclusion.[21] If the service is non-transportation, the fact that it is in a tariff does not save it from the condemnation of Section 6(7). That section forbids receiving a less compensation for transportation than the tariff. The loss on in-transit warehousing, entered into to secure the rail-haul, results in lowered receipts for the transportation and in violation of the section. Some shippers are not in a position to avail themselves of the below-cost in-transit service. They must pay the full transportation

[19] Cleveland & St. Louis Ry. v. Dettlebach, 239 U. S. 588; St. Louis & San Francisco Railway v. Gill, 156 U. S. 649, 665, 666; Atlantic Coast Line v. North Carolina Commission, 206 U. S. 1, 26-7; Northern Pacific R. Co. v. North Dakota, 236 U. S. 585, 600; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 268.

[20] 220 I. C. C. at 103-104.

[21] United States v. Am. Tin Plate Co., 301 U. S. 402, 406.

rate, without any offset from the warehousing. This discrimination between shippers is unlawful and the remedy applied by the order valid in these circumstances.

Conclusion.—We do not discuss the suggestion that the order deprives the carriers of their liberty and property contrary to the 5th Amendment. If, as here held, the order is a valid regulation of rates for warehousing services which affect transportation tariffs, it cannot be unconstitutional. Appellants' contention of unconstitutionality is predicated on the invalidity of the order under the Interstate Commerce Act.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.